TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 258.

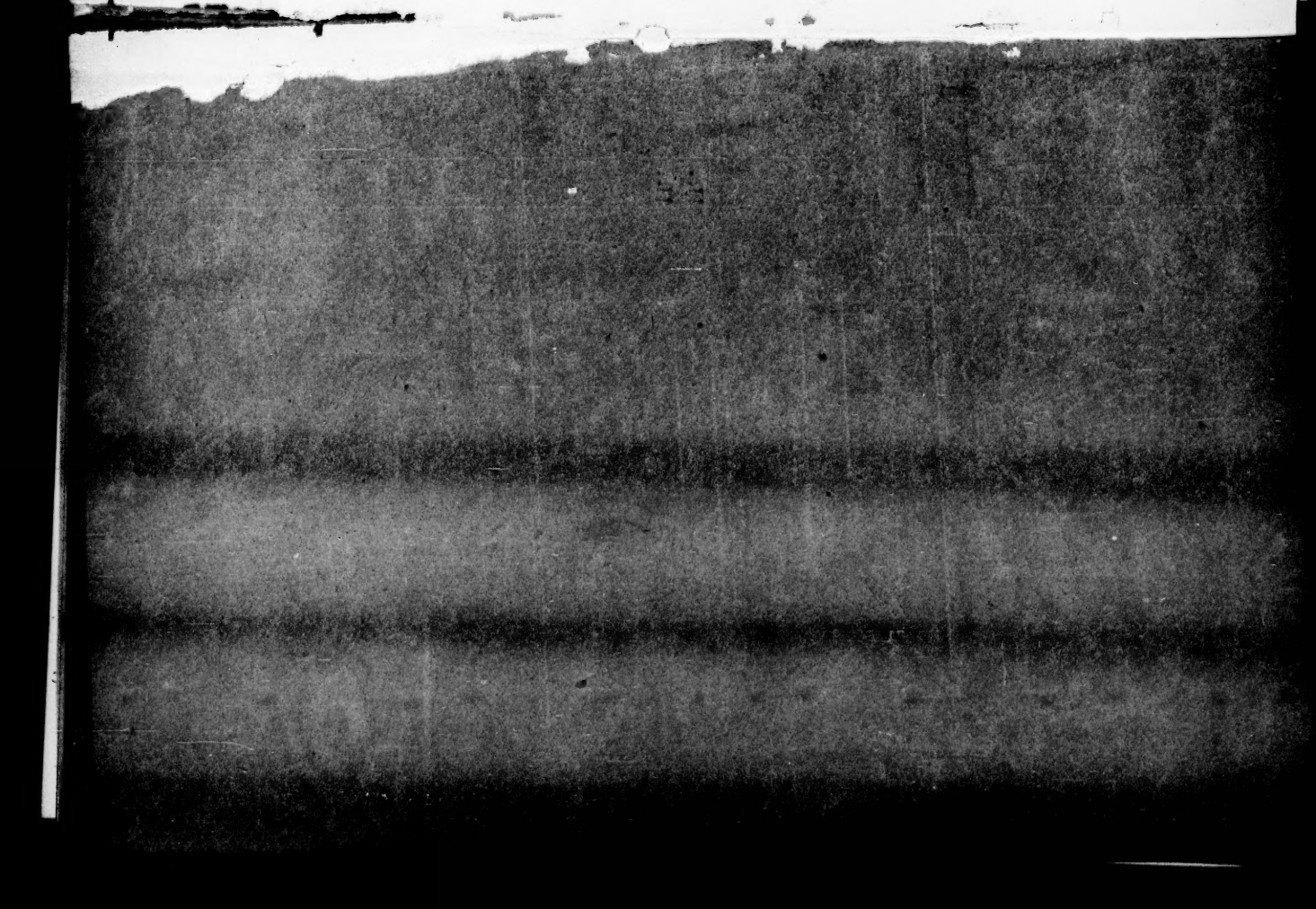
BEN HOLLADAY, PLAINTIFF IN ERROR,

vs.

ANTHONY DAILY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

FILED NOVEMBER 18, 1872.



SUPREME COURT OF THE UNITED STATES.

No. 258.

BEN HOLLADAY, PLAINTIFF IN ERROR,

vs.

ANTHONY DAILY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF COLORADO.

INDEX.

	Original.	Print.
Stipulation to docket suit	2	1
Submitted on written arguments	4	2
Transcript of record from Arapahoe County district court	7	2
Security for costs	30	11
Final judgment supreme court	32	12
Costs taxed	33	12
Original writ of error to Supreme Court United States	35	12
Copy of bond	37	13
Power of attorney to execute bond	39	14
Affidavit to amount in controversy	44	15
Original citation and service indorsed	47	16
Clerk's certificate	49	17

1 IN SUPREME COURT,
Colorado Territory, ss:

Pleas before the honorable the supreme court of Colorado Territory. At the February term, A. D. 1871.

BEN HOLLADAY, PLAINTIFF IN ERROR,
vs.
ANTHONY DAILEY, DEFENDANT IN ERROR. } Error to Arapahoe County district court.

Stipulation filed.

Be it remembered that heretofore, to wit, on the 18th day of February, A. D. 1871, there was filed in the office of the clerk of the supreme court of Colorado Territory, a stipulation in the above-entitled cause, which said stipulation is in the words and figures following, to wit:

2 Supreme court, Colorado Territory, of the February term, A. D. 1871.

BEN HOLLADAY
v.
ANTHONY DAILEY.

Error to district court first judicial district sitting within and Arapahoe County.

It is hereby stipulated that the plaintiff in error in this suit may have until the first day of April, A. D. 1871, to file the record in said suit in this court, and the abstracts, briefs, assignments of errors, security for costs, and other papers required by law and the rules of this court; and that thereupon the defendant in error will join in error, and that the issuing of a writ in error and scire facias or other process in said
3 suit is hereby waived, and consent is hereby given that said cause be now docketed, and that the parties thereto submit said cause upon written arguments within the time to be fixed by order of this court.

ALFRED SAYRE,
Att'y for Pl'ff in error.
J. Q. CHARLES,
For D'fe't in error.

(Endorsed as follows, to wit:) Ben Holladay, pl'ff in error, v. Anthony Dailey, def't in error. Filed February 18, 1872. D. W. Crater, clerk.

And afterwards, to wit, at a stated term of said supreme court of Colorado Territory, begun and held according to law, at the city of Denver, in said Territory, on the second Tuesday (it being the fourteenth day) of February, A. D. 1871; and to wit, on the 18th day of
4 February, in said year, the same being one of the days of said term of said supreme court. Present, the honorable Moses Hallett, chief justice, and honorable James B. Belford, associate justice, M. H. Shaffenberg, U. S. marshal, and David W. Crater, clerk of said court; among other the following proceedings were had in said court in said cause, to wit:

BEN HOLLADAY, PLAINTIFF IN ERROR, } 1st dist. *Error to Arapahoe* County district court.
vs.
ANTHONY DAILEY, DEFENDANT IN ERROR. }

Now on this day comes the said plaintiff in error, by Alfred Sayre, his attorney, and also comes the said defendant in error, by John Q. Charles, his attorney, and files with the clerk of this court a stipulation between the said parties, which said stipulation is in words and figures as follows, to wit: That the plaintiff in error in this suit may
5 have until the first day of April, A. D. 1871, to file the record in said suit in this court, and the abstracts, briefs, assignment of errors, security for costs, and other papers required by law and the rules of this court; and that thereupon the defendant in error will join in error, and that the issuing of a writ of error and scire facias or other process is hereby waived, and consent is hereby given that said cause be now docketed, and that the parties thereto submit said cause upon written arguments within the time to be fixed by order of this court; and thereupon it is ordered by the court that the said plaintiff in error file his written arguments herein with the clerk of this court within sixty days from this day, and that the said defendant in error file his written reply thereto with the clerk of this court within sixty days thereafter.

6 And afterwards, to wit, on the thirty-first day of March, A. D. 1871, there was filed in the office of the clerk of said supreme court a transcript of record in this cause in words and figures following, to wit:

7 TERRITORY OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the first judicial district of Colorado Territory, sitting in and for the county of Arapahoe, at a term thereof began and held at the court-house, in Denver, in said Arapahoe County, on the first Tuesday (it being the third day) of January, A. D. eighteen hundred and seventy, before the honorable Christian S. Eyster, judge of said district.

Present, honorable Christian S. Eyster, judge of said court; M. A. Rogers, esq., district attorney of said district; D. J. Cook, esq., sheriff of said county; and Oliver A. Whittemore, clerk of said court.

BEN HOLLADAY } Ejectment.
vs.
ANTHONY DAILEY. }

Be it remembered that, heretofore, to wit, on the thirty-first day of December, A. D. eighteen hundred and seventy, came Ben Holladay, by Alfred Sayre, esq., his attorney, and filed in the clerk's office of said court a stipulation transferring the above-entitled cause from the pro-
bate court of Arapahoe County to the district court of said
8 county, together with the declaration filed in said probate court, which said stipulation is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, sitting within and for the county of Arapahoe. Of the January term, A. D. 1871.

BEN HOLLADAY
vs.
ANTHONY DAILEY. } Ejectment.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit, heretofore commenced in the probate court of Arapahoe County, that the said suit be, and hereby is, transferred to the district court of the first judicial district of said Territory, sitting within and for the county of Arapahoe, together with all papers filed therein, and that said suit stand for trial in said district court, the same in all respects as if the same had originally been commenced in said district court.

Denver, Dec. 31, 1870.

ALFRED SAYRE,
Pl'ff's Att'ys.
CHARLES & ELBERT,
For D'f'd't.

9 And the said declaration so filed as aforesaid, is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the probate court of the county of Arapahoe. Of the December term, A. D. 1870.

Ben Holladay, the plaintiff in this suit, by Alfred Sayre, his attorney, complains of Anthony Dailey, the defendant, of a plea, wherefore he, the said defendant, with force and arms, etc., entered into the following-described premises, for that, whereas heretofore, to wit, on the twenty-eighth day of September, A. D. one thousand eight hundred and sixty-six, the said plaintiff was possessed of certain premises, situated, lying, and being in the county of Arapahoe, in the Territory of Colorado, and particularly described as follows, to wit: Lots numbered twenty-nine (29) and thirty, (30,) in block numbered one hundred and thirty-one, (131,) in the east division of the city of Denver; and being so possessed, the said defendant afterwards, to wit, on the first day of November, A. D. one thousand eight hundred and seventy, entered into said premises and ejected the said plaintiff therefrom, and unlawfully and unjustly withheld from the said plaintiff the possession thereof.

10 And the said plaintiff avers that he claims title to said premises in fee; wherefore the said plaintiff says that he is injured, and has sustained damage to a large amount, to wit, to the amount of one hundred dollars; and therefore he sues, &c.

And also, for that, whereas, heretofore, to wit, on the twelfth day of November, A. D. one thousand eight hundred and seventy, the said plaintiff was possessed of certain other premises situate in the county of Arapahoe aforesaid, in the said Territory of Colorado, the said last-

mentioned premises being two town lots in the city of Denver, described as follows, to wit: Lots numbered twenty-nine (29) and thirty, (30,) in block numbered one hundred and thirty-one, in the east division of the city of Denver, and so designated upon the map of said city drawn by E. J. Ebert, city surveyor. And the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the day and year last aforesaid, entered into such possession, and thereafter withheld and now unlawfully withholds said possession from the said plaintiff. And the said plaintiff avers that he claims title to said premises in fee; wherefore the said plaintiff says that he is injured, and has sustained damage to a large amount, to wit, to the amount of one hundred dollars. And therefore he brings suit, etc.

ALFRED SAYRE.
Pl'ff's Att'y.

11 And afterwards, to wit, on the ninth day of January A. D. eighteen hundred and seventy-one, the following proceedings were had in said cause in said court, to wit:

BEN HOLLADAY } Ejectment.
vs.
ANTHONY DAILEY }

Now on this day comes the said plaintiff, by Alfred Sayre, esq., his attorney, and the said defendant, by Messrs. Charles & Elbert, his attorneys, also comes, and thereupon on motion of said plaintiff's attorney the said defendant was ruled to plead in ten days from this date.

And afterwards, to wit, on the thirteenth day of January A. D. eighteen hundred and seventy-one, came the said defendant, by Messrs. Charles & Elbert, his attorneys, and filed herein his plea, which said plea is in words and figures as follows, to wit:

TERRITORY OF COLORADO,
County of Arapahoe:

In the district court of the first judicial district of Colorado Territory within and for the county aforesaid. Of the January term thereof, A. D. 1871.

12 ANTHONEY DAILEY } In ejectment.
als.
BEN HOLLADAY. }

And the said defendant, by Charles & Elbert, his attorneys, comes, defends the wrong and injury, when, &c., and says he is not guilty of unlawfully withholding the said premises claimed by the said plaintiff in manner and form as alledged in said declaration and of this he puts himself upon the country, &c.

ANTHONY DAILEY,
By CHARLES & ELBERT,
His Attorneys.

And afterwards, to wit, on the thirteenth day of February A. D. eighteen hundred and seventy-one, the following proceedings were had in said cause in said court, to wit:

BEN HOLLADAY
vs.
ANTHONY DAILEY. } Ejectment.

Now, on this day comes the said plaintiff, by Alfred Sayre, esq., his attorney, and the said defendant, by Messrs. Charles & Elbert, his attorneys, also comes, and thereupon it is stipulated by and between the parties aforesaid, through their attorneys aforesaid, that this
13 cause may be tried by the court, a jury being specially waived. And thereupon this cause coming on to be heard upon an agreed statement submitted to the court, and the court being fully advised in the premises; the court doth find for the defendant, to which finding and verdict of the court the plaintiff excepts; therefore, all and singular, the premises being seen and by the court here fully understood; it is considered by the court that the said defendant go hence without day, and that the said defendant do have and recover of and from the said plaintiff, his costs by him in and about this said suit in this behalf laid out and expended, taxed at four dollars and thirty-five cents, and have execution therefore, and thereupon, by consent of parties through their attorneys aforesaid, time, and for sixty days, was given to the said plaintiff to perfect and file his bill of exceptions to the ruling of the court in this cause; and it was ordered, by consent of parties, through their attorneys aforesaid, that the said bill of exceptions may be signed by the judge of this court in vacation as of the present term of this court.

And afterwards, to wit, on the twenty-fifth day of February A. D. eighteen hundred and seventy-one, came the said plaintiff by
14 Alfred Sayre, esq., his attorney, and filed herein his bill of exceptions, which said bill of exceptions is in words and figures, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, sitting within and for the county of Arapahoe, of the January term A. D. 1871.

BEN HOLLADAY
vs.
ANTHONY DAILEY. } Bill of exceptions.

Be it remembered that on the thirty-first day of December A. D. one thousand eight hundred and seventy, the parties to this action filed the following stipulation in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, sitting within and for the county of Arapahoe. Of the January term A. D. 1871.

BEN HOLLADAY
vs.
ANTHONY DAILEY. } Ejectment.

15 It is hereby stipulated and agreed by and between the parties to the above-entitled suit, heretofore commenced in the probate

court of Arapahoe County, that the said suit be, and hereby is, transferred to the district court of the first judicial district of said Territory, sitting within and for the county of Arapahoe, together with all papers filed therein, and that said suit stand for trial in said district court the same in all respects as if the same had originally been commenced in said district court.

Denver, Dec. 31, 1870.

ALFRED SAYRE,
Plff's Att'y.
CHARLES & ELBERT,
For Def't.

Whereupon the parties to this suit, on the eleventh day of February, A. D. one thousand eight hundred and seventy-one, filed the following agreement in the words and figures following, to wit:

TERRITORY OF COLORADO,
County of Arapahoe, ss:

In the district court of the first judicial district of the Territory of Colorado, sitting within and for the county of Arapahoe, of the January term, A. D. 1871.

16 BEN. HOLLADAY
vs.
ANTHONY DAILEY.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit as follows, namely:

First. That the lots mentioned in the declaration in this suit are within and a part of the land entered by James Hall, probate judge, &c., under an act of Congress entitled "An act for the relief of the citizens of Denver, in the Territory of Colorado," approved May 28th, 1864.

Second. That said land so entered was duly patented by the United States to the said James Hall, probate judge, &c., by letters-patent, bearing date July 1st, A. D. 1868.

Third. That on the eleventh day of August, A. D. 1865, the said James Hall, probate judge, &c., duly conveyed the said lots to the plaintiff, Ben Holladay.

Fourth. That the defendant, Anthony Dailey, was in the possesion of the said lots at the time of the commencement of this suit.

17 Fifth. That on the 27th day of September, A. D. 1866, Bela M. Hughes, acting as attorney in fact for and in the name of the plaintiff, Ben Holladay, made, executed, and delivered a conveyance of said lots (with others) to Richard E. Whitsitt for a valuable consideration, paid to said Hughes.

Sixth. That in the execution of such last-named conveyance as attorney in fact for the plaintiff, the said Bella M. Hughes acted under and by virtue of a certain letter or power of attorney from Ben Holladay and N. A. Holladay his wife, of the date of February 13th, 1866.

Seventh. That under and through said last-mentioned deed the defendant, or those under whom he claimed to hold said lots, derive title thereto.

Eighth. That the genuineness of the signature to the said power of

attorney and the said last mentioned deed, as well as the signing of the same respectively is hereby admitted.

Ninth. That the only question in dispute between the parties hereto, is the legal sufficiency of the said power of attorney from Ben Holladay and wife to Bela M. Hughes, and the deed thereunder made from Holladay by Hughes, his attorney in fact, to Richard E. Whitsitt, to pass the legal title of the said plaintiff, Holladay, in and to
18 said lots to the said Whitsett.

Tenth. That the exhibits hereto annexed, marked "A" and "B" respectively, are copies of the power of attorney and of the deed last above referred to, together with the certificate of acknowledgement thereunto attached, and said copies shall stand in this stipulation for the original.

Eleventh. The matter in controversy in suit is submitted to the court without the intervention of the jury, either party having the privilege of submitting such a statement of points and brief of authorities as he sees fit, first furnishing the opposite party with a copy thereof.

Twelfth. If the court be of the opinion that the deed and power of attorney herewith exhibited are sufficient to convey the legal title of Holladay to said lots to Whitsitt, then judgment is to be given for the defendant; if the court be of the opinion they are insufficient to convey said title, then judgment is to be given for the plaintiff.

ALFRED SAYRE,
Pl'ff's Att'y.
J. Q. CHARLES,
For Def'd't.

19 *Exhibit "A," referred to in foregoing stipulation.*

Power of attorney.—Ben Holladay and wife, to B. M. Hughes.—Filed for record, Sept. 29th, A. D. 1866, at 4 o'clock p. m.

[$1 revenue stamp attached.]

Know all men by these presents that we, Ben Holladay & N. A. Holladay, his wife, of the State of New York, for and in consideration of the sum of one dollar, to us in hand paid, as well as other considerations us thereunto moving, have this day constituted and appointed Bela M. Hughes, of the State of Kansas, our true and lawful agent and attorney in fact, for us and in our names to sell and convey to any purchaser or purchasers for such price or prices as to him may seem best, all or any lots of ground in Denver City, Colorado, in the county of Arapahoe, in said Territory, the title to which is now vested in said Ben Holladay, excepting, however, a certain house and lot purchased of one Cass by said Holladay, for an express and stage office, and the lots occupied by the overland stage line, (Ben Holladay, proprietor,) with its workshops, barns, and houses; and the said Ben Holladay & N. A. Holladay, his wife, do hereby authorize said Hughes to proceed to sell said property on such terms as he may consider best for their interest, this power to sell said property and real estate or any part of it, to continue until the whole of the said property or real estate is sold by their said
20 atttorney and agent, and shall extend also fully to all out-lots or parcels of ground in and around the said Denver City; and it is provided that in case of the death of either of the said parties making this power of attorney, no further power shall be necessary to our said attorney in fact & agent, to enable him to complete conveyances for property then sold, or to proceed to sell the same or any part thereof

thereafter; but he shall proceed, notwithstanding, to sell and convey said property until the same is all disposed of by him. It is understood that all the expenses attendant upon the sale and conveyance of said property shall be paid by said Hughes, his commission for selling being regulated by a separate instrument of writing of even date with this. Hereby ratifying & confirming all that the said Hughes may do & perform in the premises under this power of attorney to him given, we have hereunto set our hands & seals this 13th February, A. D. 1866.

BEN HOLLADAY. [SEAL.]
N. A. HOLLADAY. [SEAL.]

STATE OF NEW YORK,
City and County of New York, ss.:

Be it remembered that on this the 16th day of February, 1866, before the undersigned, a notary public within and for the city and county
21 of New York, personally came in his own proper person, Ben Holladay, who is well known to me to be the same person whose name is subscribed to the foregoing instrument of writing as a party thereto, and who acknowledged that he had signed the same as a party to said instrument of writing, and that he did the same freely and voluntarily for the objects, uses, and purposes therein set forth and stated.

In testimony whereof I have hereunto affixed my hand and official seal the day and year aforesaid.

[SEAL.] DU PLESSIS M. HELM.
Notary Public in and for the City and County of New York.

STATE OF NEW YORK,
City and County of New York:

I, William C. Conner, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county, the same being a court of record, do hereby certify, that Du Plessis M. Helm, whose name is inscribed to the certificate of the proof or acknowledgement of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a notary public in and for the city and county of New York, dwelling in the said city, commis-
22 sioned and sworn and duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgement is genuine.

I further certify that said instrument is executed and acknowledged according to the law of the State of New York.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court and county the 17th day of Febru., 1866.

[SEAL.] WM C. CONNER, *Clerk*.

[Rev. St.]

DISTRICT OF COLUMBIA,
County of Washington:

Be it remembered that on this twenty-first day of February, A. D. 1866, personally appeared before me, the undersigned, a notary public in and for the county and district aforesaid, N. A. Holladay, who is personally known to me to be the wife of Ben. Holladay, of New York City, and whose name, that is the name of the said N. A. Holladay, is subscribed to the foregoing instrument of writing as a party thereto, who acknowledged on an examination separate and apart from her said

husband, that she had signed the same freely, voluntarily, with-
23 out the fear, compulsion, or undue influence of her said husband, and relinquished her dower in the property therein described, the said instrument of writing having been by me explained to her, and she confessing that she fully understood the same.

In witness whereof I have hereunto set my hand and official seal this 21st day of February, A. D. 1866.

[SEAL.] N. CALLAN,
Notary Public.

DISTRICT OF COLUMBIA, *to wit:*

I, Return J. Meigs, clerk of the supreme court of the District of Columbia, hereby certify that Nicholas Callan, esq., whose genuine signature is subscribed to the foregoing certificate of acknowledgment, was, at the time of signing and attesting the same, a notary public for said District, duly commissioned and qualified, authorized to take acknowledgements and to administer oaths, and that his attestation thereto is according to law.

Witness my hand and the seal of said court this 21st day of February, 1866.

[SEAL.] R. J. MEIGS, *Clerk.*

[Rev. 5c.]

24 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Webster D. Anthony, county clerk and ex-officio recorder in and for said county, in the Territory aforesaid, do hereby certify that the foregoing is a true copy from the records of an instrument filed for record on the 29th day of September, A. D. 1866, and recorded in Book 10 of said Arapahoe County records, on pages 135, 136, & 137.

Witness my hand and official seal this 3d day of December, A. D. 1870.

[SEAL.] WEBSTER D. ANTHONY,
County Clerk & Recorder.

[Rev. 5c.]

Exhibit "B" referred to in foregoing stipulation.

Warranty deed. Ben Holladay, by att'y, to Richard E. Whitsitt. Filed for record, Dec. 13th, A. D. 1870, at 3 o'clock p. m.

This indenture, made this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-six, between Ben Holladay, of the city and State of New York, by Bela M. Hughes, his duly authorized attorney in fact, party of the first part, and Richard E. Whitsitt, of the city of Denver, county of Arapahoe, and Territory of Colorado, party of the second part, witnesseth:

That the said party of the first part, for and in consideration
25 of the sum of thirty thousand ($30,000) dollars to the said party of the first part, in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all the following-described pieces, parcels,

or lots of land situate, lying, and being in the county of Arapahoe, and Territory of Colorado, to wit: * * *

28 TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, Webster D. Anthony, county clerk and ex-officio recorder in and for said county, in the Territory aforesaid, do hereby certify that the foregoing is a true copy from the records of an instrument as filed and recorded in book 28 of said Arapahoe County records, on pages 598, 599, 600, 601, & 602, on the 13th day of December, A. D. 1870, at the hour of 3 o'clock p. m.

Witness my hand and official seal, at office in Denver City, this 16th day of December, A. D. 1870.

[SEAL.] WEBSTER D. ANTHONY,
County Clerk & Recorder.

[Rev. 5 c.]

Which was all the evidence offered by either of the said parties; whereupon the case was submitted to the court, a jury being waived, and thereupon the court gave judgment against the plaintiff, to which the plaintiff then and there excepted. And inasmuch as the matters aforesaid do not appear of record, the counsel for the plaintiff presents this bill of exceptions, and prays that the same may be signed and sealed by the court, and made a part of the record in said cause; and it is done accordingly.

29 JAMES B. BELFORD, [SEAL.]
Judge, &c.

TERRITORY OF COLORADO,
County of Arapahoe:

I, Oliver A. Whittemore, clerk of the district court of the first judicial district of Colorado Territory, in and for the county of Arapahoe, do certify that the above and foregoing is a full and complete transcript and copy of all proceedings had and entered of record, and of all papers filed in said court, in a certain cause lately pending therein, wherein Ben Holladay was plaintiff and Anthony Dailey defendant.

In witness whereof I have hereunto set my hand, and the seal of said court affixed, this 23d day of March, A. D. 1871.

[SEAL OF COURT.] OLIVER A. WHITTEMORE, *Clerk.*

(Endorsed:) Ben Holladay, pl'ff in error, vs. Anthony Dailey, def't in error. Transcript of record. Filed March 31, 1871. D. W. Crater, clerk.

30 And on the same day last aforesaid, and to wit, on the 31st day of March, A. D. 1871, there was filed in the office of the clerk of this supreme court a cost-bond according to law, which said bond is in words and figures following, to wit:

TERRITORY OF COLORADO:

In the supreme court, of the February term, A. D. 1871.

BEN HOLLADAY, PL'FF IN ERROR,
vs.
ANTHONY DAILEY, DEF'T IN ERROR.

I do hereby enter myself security for costs in this cause, and acknowledge myself bound to pay, or cause to be paid, all costs which may

cerue in this action, either to the opposite party or to any of
31 the officers of this court, in pursuance of the laws of this Territory.

ALFRED SAYRE.

(Endorsed as follows:) In supreme court. Ben Holladay, pl'ff in error, vs. Anthony Daily, def't in error. Cost-bond. Filed March 31, 1871. D. W. Crater, clerk.

And afterwards, to wit, at a stated term of said supreme court of Colorado Territory, begun and held at Denver, in said Territory, on the second Tuesday (it being the thirteenth day) of February, A. D. 1872; and afterwards, to wit, on the twenty-ninth day of February, A. D. 1872, the same being one of the days of said term of said supreme
32 court—present, Hon. Moses Hallett, chief justice; Hon. James B. Belford, and Hon. Ebenezer T. Wells, associate justices; William A. Smith, deputy U. S. marshal, and David W. Crater, clerk of said court—among other, the following proceedings were had in said court in said cause, to wit:

BEN HOLLADAY, PLAINTIFF IN ERROR, *vs.* ANTHONY DAILEY, DEFENDANT IN ERROR. } Error to district court, Arapahoe County.

On this day this cause came on to be heard, and the same having been heretofore argued by counsel for the said parties and submitted to the consideration and judgment of the court, and it appearing to the court that there is no error either in the record and proceedings, or in the judgment of the said district court of Arapahoe County, in this cause—

33 It is ordered by the court that the judgment of the said district court be affirmed and stand in full force and effect, and that the opinion of the court filed herein be recorded, and that the said defendant in error recover of and from the said plaintiff in error his costs and charges in this behalf expended, and that he have execution therefor.

His honor Chief Justice Hallett took no part in the decision of this cause.

Whereat, upon the fee-book of this court, there was taxed against the said plaintiff in error in this cause the sum of forty-nine dollars and twenty-five cents for the costs and charges in this behalf expended.

And afterwards, to wit, and on the 28th day of September, A.
34 D. 1872, there was filed in the office of the clerk of the supreme court of Colorado Territory, in this cause, the following writ of error together with a copy thereof; which said writ of error is hereto annexed in words and figures as follows:

35 *Original writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the chief justice and associate justices of the supreme court of the Territory of Colorado, greeting:

Because in the record and proceedings, and also in the rendition of a judgment in a plea which is in the said supreme court before you, be-

tween Ben Holladay, appellant, and Anthony Daily, appellee, a manifest error hath happened to the great damage of the said Ben Holladay, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first
36 Monday of December next, in said Supreme Court of the United States to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of March, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[SEAL.] DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory.

Allowed by—

MOSES HALLETT,
Chief Justice Sup. Court Col. Ter'y.

(Indorsed:) Ben Holladay, pl'ff in error, v. Anthony Dailey, def't in error. Writ of error. Filed September 28, 1872. David W. Crater, clerk of supreme court, Colorado Terr't'y.

37 And on the same day, to wit, the 28th day of September, there was filed in the office of the clerk of the supreme court of Colorado Territory, a certain bond, power of attorney to execute the same, and an affidavit of amount in controversy, and which said bond, power of attorney, and affidavit are in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Ben Holladay, of Portland, in the State of Oregon, and Clarence P. Elder, of the city of Denver, in the Territory of Colorado, are held and firmly bound unto Anthony Dailey, of the said city of Denver, and Territory aforesaid, in the sum of five hundred dollars, lawful money of the United States, for the payment of which we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents.

38 Whereas the above bounden Ben Holladay hath prosecuted a writ of error to the Supreme Court of the United States, to reverse a judgment rendered by the supreme court of the Territory of Colorado, in a certain action in said last-named court, lately depending, wherein the above bounden Ben Holladay was plaintiff in error, and the said Anthony Dailey was defendant in error, to reverse the judgement of the said supreme court of the Territory of Colorado:

Now, therefore, the condition of this obligation is such that if the above-named Ben Holladay shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good his plea, then

this obligation shall be void; otherwise the same shall be and remain in full force and effect.

BEN HOLLADAY, [SEAL.]
By ALFRED SAYRE, [SEAL.]
39 CLARENCE P. ELDER, [SEAL.]
His Att'y in fact.

Sealed and delivered in presence of—

Taken and approved by—

MOSES HALLETT,
Chief Justice Supreme Court Col. Terr'y.

(Endorsed:) Ben Holladay, appellant, vs. Anthony Dailey, appellee. Bond for costs. Filed September 28th, 1872. David W. Crater, clerk supreme court Col. Ter.

Power of attorney.

[U. S. internal-revenue stamp, one dollar, duly canceled.]

Know all men by these presents that I, Ben Holladay, of Westchester County, State of New York, residing at Portland, in the State of Oregon, have made, constituted, and appointed, and by these presents, do make, constitute, and appoint Alfred Sayre, of the city of Denver, and Territory of Colorado, my true and lawful attorney in fact and also in law, within and for said Territory of Colorado, for the pur-
40 poses hereinafter mentioned, that is to say, for me and in my name, and for my use and benefit, to ask and demand of any and all persons the possession of any and all real estate, lots, parcels, and peices of ground, together with the appurtenances, situate, lying, and being in the said Territory of Colorado, and especially any town lots or other peices of ground within the limits of the city of Denver, county of Arapahoe, and Central City, county of Gilpin, and Territory aforesaid, to which I have, or hereafter may have or claim to have, any right, title, or interest whatsoever. Also for me and in my name, and for my use and benefit, to institute and commence in any court of the said Territory of Colorado that my said attorney may select, any and all suits, actions, or legal proceedings whatsoever, either legal or equitable, which my said attorney may deem proper or necessary for the purpose of recovering the possession of said real estate, lots, peices or parcels of land, or any of them, or to recover, establish my right or title to
41 the same, or any part thereof, or to recover damages or mesnre profits for the detention and use of the same or any part or portion thereof, or any other such action or proceeding, either in law or equity, which my said attorney may see fit and proper to institute and commence for me, whether the same relates to and in any affects my claim to realty or the possession thereof or not; and for me to prosecute any suit he may so commence to final judgment, and thereafter in his discretion to take for me and in my name any appeal from any such judgement, or to sue out a writ of error to the court rendering the same, or by any legal process or proceeding to remove any of such suits from an inferior to a superior or appellate court, until the court of last resort is reached; and for me and in my name to sign, seal, or otherwise duly execute and deliver any bond or other instrument in writing, that to my said attorney may seem requisite and necessary to be given in or to commence, prosecute, appeal, remove, or otherwise

42 proceed in any suit in my name or for my use and benefit, or in which I have any interest or concern, giving and granting to my said attorney full power and authority to do any and all acts in and about the premises that he may deem requisite and necessary to be done, as fully and completely to all intents and purposes as I could or might do in person, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney may lawfully do by virtue of this letter or power of attorney.

In witness whereof I, the said Ben Holladay, have hereunto set my hand and seal this 21st day of May, in the year of our Lord one thousand eight hundred and seventy.

BEN HOLLADAY. [SEAL WAFER.]

Signed, sealed, and delivered in presence of—
R. H. TOWLER.
A. G. CUNNINGHAM.

43 STATE OF OREGON,
County of Multnomah, ss:

Be it remembered that on this 21st day of May, A. D. 1870, before me, the undersigned, a notary public in and for the county of Multnomah, and State of Oregon, personally appeared the above-named Ben Holladay, known to me to be identical described in, and who executed the within letter or power of attorney, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal at the city of Portland, in the State of Oregon, on the day and year last above written.

[NOTARIAL SEAL.] ANDREW J. MOSES,
Notary Public for the State of Oregon.

44 (Endorsed:) Ben Holladay to Alfred Sayre. Power of att'y. Ben Holladay, pl'ff in error, v. Anthony Dailey, def't in error. Bond & authority for executing the same for principal. Filed September 28, 1872. David W. Crater, clerk of supreme court of Colorado Territory.

Affidavit.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Alfred Sayre, being first duly sworn, on oath deposes and says that he was the attorney of Ben Holladay, the plaintiff in error in a certain suit lately depending in the supreme court of the Territory of
45 Colorado, wherein Anthony Dailey was the defendant in error; that by said suit the title and ownership of certain real estate, to wit, lots numbered twenty-nine (29) and thirty, (30,) in block numbered one hundred and thirty-one, (131,) in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado, was involved and put into controversy; that the said Ben. Holladay proposes to remove the said suit by writ of error from the said supreme court of the Territory of Colorado to the Supreme Court of the United States; that deponent is well acquainted with the location of the said lots, and knows the value thereof; that the value of said lots greatly exceeds the sum of one thousand dollars; and further deponent saith not.

ALFRED SAYRE.

this obligation shall be void; otherwise the same shall be and remain in full force and effect.

BEN HOLLADAY, [SEAL.]
By ALFRED SAYRE, [SEAL.]
39 CLARENCE P. ELDER, [SEAL.]
His Att'y in fact.

Sealed and delivered in presence of—

Taken and approved by—

MOSES HALLETT,
Chief Justice Supreme Court Col. Terr'y.

(Endorsed:) Ben Holladay, appellant, vs. Anthony Dailey, appellee. Bond for costs. Filed September 28th, 1872. David W. Crater, clerk supreme court Col. Ter.

Power of attorney.

[U. S. internal-revenue stamp, one dollar, duly canceled.]

Know all men by these presents that I, Ben Holladay, of Westchester County, State of New York, residing at Portland, in the State of Oregon, have made, constituted, and appointed, and by these presents, do make, constitute, and appoint Alfred Sayre, of the city of Denver, and Territory of Colorado, my true and lawful attorney in fact and also in law, within and for said Territory of Colorado, for the pur-
40 poses hereinafter mentioned, that is to say, for me and in my name, and for my use and benefit, to ask and demand of any and all persons the possession of any and all real estate, lots, parcels, and peices of ground, together with the appurtenances, situate, lying, and being in the said Territory of Colorado, and especially any town lots or other peices of ground within the limits of the city of Denver, county of Arapahoe, and Central City, county of Gilpin, and Territory aforesaid, to which I have, or hereafter may have or claim to have, any right, title, or interest whatsoever. Also for me and in my name, and for my use and benefit, to institute and commence in any court of the said Territory of Colorado that my said attorney may select, any and all suits, actions, or legal proceedings whatsoever, either legal or equitable, which my said attorney may deem proper or necessary for the purpose of recovering the possession of said real estate, lots, peices or parcels of land, or any of them, or to recover, establish my right or title to
41 the same, or any part thereof, or to recover damages or mesnre profits for the detention and use of the same or any part or portion thereof, or any other such action or proceeding, either in law or equity, which my said attorney may see fit and proper to institute and commence for me, whether the same relates to and in any affects my claim to realty or the possession thereof or not; and for me to prosecute any suit he may so commence to final judgment, and thereafter in his discretion to take for me and in my name any appeal from any such judgement, or to sue out a writ of error to the court rendering the same, or by any legal process or proceeding to remove any of such suits from an inferior to a superior or appellate court, until the court of last resort is reached; and for me and in my name to sign, seal, or otherwise duly execute and deliver any bond or other instrument in writing, that to my said attorney may seem requisite and necessary to be given in or to commence, prosecute, appeal, remove, or otherwise

42 proceed in any suit in my name or for my use and benefit, or in which I have any interest or concern, giving and granting to my said attorney full power and authority to do any and all acts in and about the premises that he may deem requisite and necessary to be done, as fully and completely to all intents and purposes as I could or might do in person, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney may lawfully do by virtue of this letter or power of attorney.

In witness whereof I, the said Ben Holladay, have hereunto set my hand and seal this 21st day of May, in the year of our Lord one thousand eight hundred and seventy.

BEN HOLLADAY. [SEAL WAFER.]

Signed, sealed, and delivered in presence of—
R. H. TOWLER.
A. G. CUNNINGHAM.

43 STATE OF OREGON,
County of Multnomah, ss:

Be it remembered that on this 21st day of May, A. D. 1870, before me, the undersigned, a notary public in and for the county of Multnomah, and State of Oregon, personally appeared the above-named Ben Holladay, known to me to be identical described in, and who executed the within letter or power of attorney, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my notarial seal at the city of Portland, in the State of Oregon, on the day and year last above written.

[NOTARIAL SEAL.]

ANDREW J. MOSES,
Notary Public for the State of Oregon.

44 (Endorsed:) Ben Holladay to Alfred Sayre. Power of att'y. Ben Holladay, pl'ff in error, v. Anthony Dailey, def't in error. Bond & authority for executing the same for principal. Filed September 28, 1872. David W. Crater, clerk of supreme court of Colorado Territory.

Affidavit.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

Alfred Sayre, being first duly sworn, on oath deposes and says that he was the attorney of Ben Holladay, the plaintiff in error in a certain suit lately depending in the supreme court of the Territory of
45 Colorado, wherein Anthony Dailey was the defendant in error; that by said suit the title and ownership of certain real estate, to wit, lots numbered twenty-nine (29) and thirty, (30,) in block numbered one hundred and thirty-one, (131,) in the east division of the city of Denver, county of Arapahoe, and Territory of Colorado, was involved and put into controversy; that the said Ben. Holladay proposes to remove the said suit by writ of error from the said supreme court of the Territory of Colorado to the Supreme Court of the United States; that deponent is well acquainted with the location of the said lots, and knows the value thereof; that the value of said lots greatly exceeds the sum of one thousand dollars; and further deponent saith not.

ALFRED SAYRE.

{SEAL OF SUPREME COURT OF COLORADO TER'TY.} Subscribed and sworn to before me this twenty-eighth day of September, A. D. 1872.

DAVID W. CRATER,
Clerk of the Supreme Court of Colorado Territory, and the seal thereof attached.

46 (Endorsed:) Ben Holladay, pl'ff in error, vs. Anthony Dailey, def't in error. Affidavit of amount in controversy. Filed September 28, 1872. David W. Crater, clerk of supreme court of Colorado Territory.

And afterwards, and to wit, on the 1st day of October, A. D. 1872, there was filed in the office of the clerk of the supreme court of Colorado Territory, a citation with its service endorsed thereon, which said citation and service is hereto attached, and is in words and figures as follows:

47 *Original citation.*

UNITED STATES OF AMERICA, *ss:*

TO ANTHONY DAILY, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Colorado, wherein Ben Holladay is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Moses Hallett, chief justice of the supreme court of the Territory of Colorado, this twenty-eighth day of September, in the year of our Lord one thousand eight hundred and seventy-two.

MOSES HALLETT,
Chief Justice Sup. Court Col. Ter'y.

48 TERRITORY OF COLORADO,
County of Arapahoe, ss:

Cha's S. Thomas, being duly sworn, on oath says that he served the within citation by delivering a true copy thereof to Bela M. Hughes, this 1st day of October, 1872; that the said Bela M. Hughes is one of the attorneys at law of the within-named Anthony Dailey, in the within-named suit.

CHA'S S. THOMAS.

Subscribed and sworn to before me this first day of October, A. D. 1872.

[SEAL.]

DAVID W. CRATER,
Clerk of Supreme Court of Colorado Territory.

(Indorsed:) Ben Holladay, pl'ff in error, v. Anthony Dailey, def't in error. Citation. Filed October 1st, 1872. David W. Crater, clerk of supreme court of Colorado Territory.

49 TERRITORY OF COLORADO,
Arapahoe County, ss:

Supreme court clerk's office, Denver, October 8, 1872.

I, David W. Crater, clerk of the supreme court of Colorado Territory, do hereby certify that I have compared the above and foregoing writings annexed to this certificate, and that they are full and true copies of their respective originals, and correct transcripts therefrom, now on file and remaining of record in my office; that the above and foregoing writ of error and citation, with service endorsed thereon, is the original writ of error, citation, and service filed in my office in the case of Ben Holladay, plaintiff in error, and Anthony Dailey, defendant in error; altogether being a full and complete record and proceedings in said supreme court in said cause, as the same remain of record and on file in my office.

In testimony whereof I have hereunto subscribed my name
50 and affixed the seal of said supreme court, at Denver, in said Territory, this eighth day of October, A. D. 1872.

[SEAL.] DAVID W. CRATER,
Clerk of Supreme Court of Colorado Territory.

Fees for transcript: 109 folios, 100 words 20c—21.80; certificate & seal, 1.00—$22.80. Paid by pl'ff in error.

(Indorsed:) Ben Holladay, pl'ff in error, v. Anthony Daily, def't in error. Transcript of record.

(Indorsement on cover:) No. 258. Ben Holladay, plaintiff in error, vs. Anthony Daily. Colorado Terr'y sup. court. Filed 18 November, 1872.

REC. 258—2

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

BEN HOLLADAY, *Plaintiff in Error*,
vs.
ANTHONY DAILEY. } No. 258.

In Error to the Supreme Court of the Territory of Colorado.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

BEN HOLLADAY, *Plaintiff in Error*,
vs.
ANTHONY DAILEY.

No. 258.

In Error to the Supreme Court of the Territory of Colorado.

This is an action to recover the possession of real estate in Denver, Colorado Territory.

The defendant claims to derive title from the plaintiff through two certain instruments, of which the following are copies:

"Know all men by these presents that we, Ben Hollady & N. A. Holladay, his wife, of the State of New York, for and in consideration of the sum of one dollar, to us in hand paid, as well as other considerations us thereunto moving, have this day constituted and appointed Bela M. Hughes, of the State of Kansas, our true and lawful agent and attorney in fact, for us and in our names to sell and convey to any purchaser or purchasers for such price or prices as to him may seem best, all or any lots of ground in Denver City, Colorado, in the county of Arapahoe, in said Territory, the title to which is now vested in said Ben Holladay, excepting, however, a certain house and lot purchased of one Cass by said Holladay, for an express and stage office, and the lots occupied by the overland stage line, (Ben Holladay, proprietor,) with its workshops, barns,

and houses; and the said Ben Holladay & N. A. Holladay, his wife, do hereby authorize said Hughes to proceed to sell said property on such terms as he may consider best for their interest, this power to sell said property and real estate or any part of it, to continue until the whole of the said property or real estate is sold by their said attorney and agent, and shall extend also fully to all out-lots or parcels of ground in and around the said Denver City; and it is provided that in case of the death of either of the said parties making this power of attorney, no further power shall be necessary to our said attorney in fact & agent, to enable him to complete conveyances for property then sold, or to proceed to sell the same or any part thereof thereafter; but he shall proceed, notwithstanding, to sell and convey said property until the same is all disposed of by him. It is understood that all the expenses attendant upon the sale and conveyance of said property shall be paid by said Hughes, his commission for selling being regulated by a seperate instrument of writing of even date with this. Hereby ratifying & confirming all that the said Hughes may do & perform in the premises under this power of attorney to him given, we have hereunto set our hands & seals this 13th February, A. D. 1866.

"BEN HOLLADAY. [SEAL.]
"N. A. HOLLADAY. [SEAL.]

"This indenture, made this twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-six, between Ben Holladay, of the city and State of New York, by Bela M. Hughes, his duly authorized attorney in fact, party of the first part, and Richard E. Whitsitt, of the city of Denver, county of Arapahoe, and Territory of Colorado, party of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the sum of thirty thousand ($30,000) dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged,

has granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all the following described pieces, parcels, or lots of land situate, lying, and being in the county of Arapahoe, and Territory of Colorado, to wit: * * * * *

* * * * * * *

Lots numbered twenty-nine (29) and thirty, (30,) in block numbered one hundred and thirty-one (131) in the east division of the city of Denver, * * *

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or anywise thereunto appertaining, and all the estate, right, title, interest, and claim whatsoever of the said party of the first, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, his heirs and assigns, forever; and the said party of the first part the aforesaid peices, parcels or lots of land unto the said party of the second part, his heirs and assigns, against the claim or claims of all and every person whatsoever, doth and will warrant and forever defend by these presents.

"In witness whereof the said party of the first part has hereunto set his hand seal the day and year first above written.

"BEN HOLLADAY, [SEAL.]
"By his attorney in fact, B. M. HUGHES, [SEAL.]"

The court below gave judgment for the defendant. The errors assigned are:

1st. That the court below erred in holding that the said warrant power of attorney authorized the attorney therein named to make the said deed.

2d. The court erred in holding that the said deed was a valid conveyance of the property therein described.

3d. The court erred in rendering judgment for the defendant.

Hughes had no right or authority under said power of attorney to execute a deed in the name of Ben. Holladay alone, and, therefore, the deed in question is void. He was invested with a special power to sell and convey certain lands in the joint names of Ben. Holladay and N. A. Holladay. All the expressions in the power of attorney are full and clear to this effect.

"*We*, for a consideration to *us* paid, *have* constituted and appointed Bela M. Hughes *our* attorney for *us* and in *our* names to sell and convey certain real estate. The said Ben. Holladay and N. A. Holladay, his wife, do hereby authorize said Hughes to proceed to sell said property on such terms as he may consider best for *their* interest," &c. Provision is also made for the death of one of the donors of the power, in which event the power is to be exercised in the name of the survivor, clearly implying that before that event it is to be exercised in their joint names.

That it was intent of those who made this warrant of attorney to confer upon Hughes the power to act in their joint names and not for each separately, except in case of death, and that this intent was unmistakably expressed in the instrument is too clear for controversy.

Hughes violated the spirit and letter of his warrant of attorney. The power which he exercised to sell the land of another was never created.

Story on Agency, secs. 17, 42, 68, and 166.
2 Wash. R. P., 317.
Snow *vs.* Perry, 9 Pick., 542.
Chase *vs.* Dana, 44 Illinois, 262.

1 Peters, 145 -
4 McLean 479 -
2, Cark 436

To show that the deed is not unauthorized and void, it is said that it was made in substantial compliance with the warrant of attorney. To this it is answered:

First. That the deed is not so much a departure from the mode prescribed of exercising a power, as the exercise of a power different from the one conferred. The power was to make a deed in the name of two persons. The power exercised was the making of a deed in the name of one person. This was not a legal and valid compliance with the authority granted.

Batty *vs.* Caswell, 2 Johns., 49.

Gibson *vs.* Colt, 7 Johns., 393.

Rossiter *vs.* Rossiter, 8 Wen., 494, 499.

An attorney acting under a written authority cannot substitute what in his judgment is substance for the forms required in the execution of the power.

It is said the legal title was in Holladay, and, therefore, it was only necessary to execute a deed in his name. To this it is answered, that if Holladay owned the property, he had a perfect right to say upon what terms and with what forms it should be sold and conveyed. If he had provided in the warrant of attorney that the deed made under it should have three witnesses, the deed would not be valid with one or two witnesses. He gave Hughes no authority to execute the deed in question. No inquiry can legally be made into Holladay's motives or reasons for requiring a joint deed in order to convey the property. Does the power of attorney require it? If so, and it was not done, that is the end of controversy upon the subject.

Hughes was empowered to sell the property, "the title to which is now vested in said Ben Holladay," implying that elsewhere there were equities. Nothing in the case conflicts with the assumption that the lands were purchased with the money of N. A. Holladay, though the legal title was vested in Ben Holladay. When a woman executes a power of attorney with a view of having her right of dower relinquished under it, that object is generally expressed, but no reference is made to that subject in the power under consideration. Suppose, however, the object of N. A. Holladay, in signing the power of attorney, was to authorize a relinquishment of her dower, Ben Holladay then had the right to have the deed executed to that effect. Persons buying real estate of a married man do not generally pay as much for it when there is no relinquishment of the wife's dower. Possibly the purchase money in this case was thousands of dollars less than it would have been if the deed had been executed in the joint names of the husband and wife.

Suppose N. A. Holladay had formally and duly revoked this power before any sale or conveyance under it by the attorney, could there then be a legal execution of the power? Perhaps the instrument was made in the form it is to reserve to N. A. Holladay this right.

Courts cannot dispense with any of the forms or ceremonies required for the execution of a power on the ground that they are not necessary. Any party taking that ground must seek relief in a court of equity. Suppose A and B, partners in trade, execute to C a power of attorney to sell and convey in their joint names cer-

tain real estate, the title of which is in A, can C, upon the assumption that B has no interest in the property, execute a valid conveyance therefor in the name alone of A?

Hawkins *vs.* Kemp, 4 East., 170.

Thruxlin *vs.* Attorney General, 1 Vernon, 340.

The purchaser is chargeable with notice that the deed was not executed in accordance with the power.

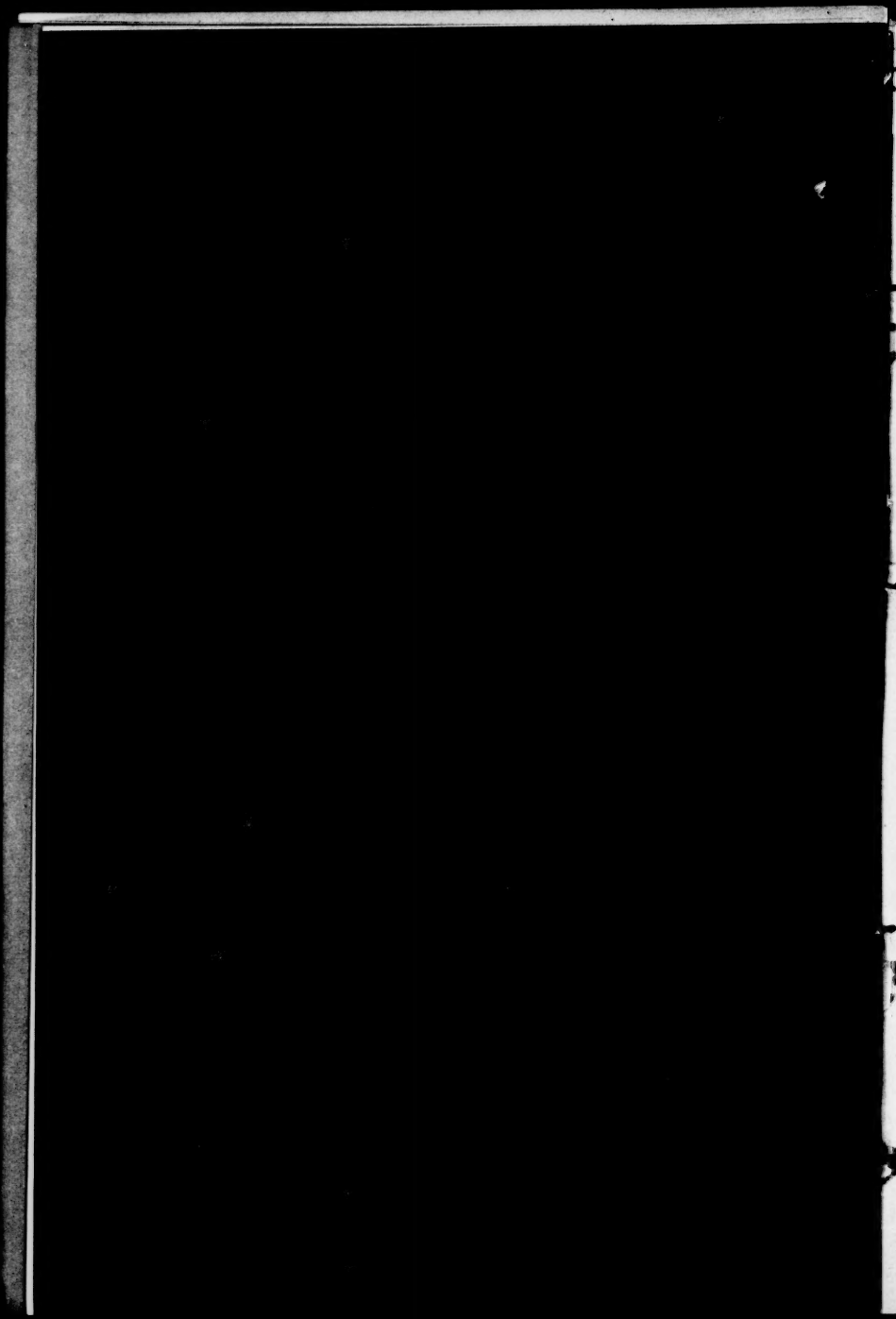
Story on Agency, secs. 72, 126, and 133.

Rogers *vs.* Kneeland, 10 Wen., 28.

Holladay repudiates the pretended execution of the power of Hughes, and there is nothing in the record to show that he ever received a dollar of the purchase money, or in any other way approved the act.

It is respectfully submitted that the judgment of the court below ought to be reversed.

GEO. H. WILLIAMS,
Attorney for Plaintiffs in Error.



Supreme Court of the United States

DECEMBER TERM, 1872.

HOLLADAY, PLAINTIFF IN ERROR,

vs.

DAILEY, DEFENDANT IN ERROR.

Error to the Supreme of Colorado Territory.

ARGUMENT AND BRIEF OF AUTHORITIES FOR THE DEFENDANT IN ERROR.

J. W. DENVER,

For Defendant in Error.

Judd & Detweiler, Printers.

In the Supreme Court of the United States

IN OCTOBER TERM, 1873.

BEN HOLLADAY, *Plaintiff in Error*,
vs. } Error.
ANTHONY DAILEY, *Defendant in Error.*

POINTS FOR DEFENDANT IN ERROR.

First. The deed executed by B. M. Hughes, in the name of, and as Attorney in fact for, Ben Holladay, to Richard E. Whitsitt for the lots in controversy, which said deed is set out as exhibit "B" in the agreed case to be found in the Record, was valid and did pass the title of said Holladay to said lots, under the power given Hughes.

AUTHORITY TO THIS POINT.

Statute of Colorado Territory, approved Nov. 7th, 1861. Story on Agency, Sections 166, 86, 165, 170, 172, 58. Wilson *vs.* Troup, 2 Cowan 228, 195; Sumner *vs.* Williams, 8 Mass. 214; Fowle *vs.* Bigelow, 10 Mass. 384; Whalen *vs.* Kaufman, 14 Johns. 104; Com. Dig. Att'y 15; North River B'k *vs.* Aymar, 3 Hill 262; Nixon *vs.* Hyserott, 5 Johns. 58; Batty *vs.* Carswell 2 Johns. 48, 49, 48, 50; 2 Cow. 228, 233, 195; Sugden on Powers, 459; Mose. 146; Doug. 292, 280; Vanada *vs.* Hopkins 1 J. J. M. 288,

5—R.64.

292, 282; Co. Litt. Sec. 221, 283; Barber *vs.* Harris 15 Wendell 617; Shanks *vs.* Lancaster, 5 Grattan 110; Brac. Lib. 5 f 4, 1, 6; Shartzer *vs.* Love 40 California Rep'ts; Smith's Merc. Law 115; 2 Wash. Real Prop. 3d Ed. 621, 300; 4 Cruise Dig. 205; 1 Am. Leading Cases 563, 567; Dunlap's Paley on Agency, 192 and note 3, 198; Chase *vs.* Dana 44 Ills. 202; Snow *vs.* Perry 9 Pick. 541; Gibson *vs.* Colt 7 Johns. 390; 6 Hill 336, 338; 23 Wend. 267, 268, 260; 13 Wend. 521, 527; Rossiter *vs.* Rossiter 8 Wend. 500; 2 Scott, N. R.; 3 Burr 1364, 1446; Cowper 600, 6 East. 105; Broome's Legal Maxims, 363 and note 7, 364; 3 Lev. 370 M. & W, 516; 3 Atk. 136; 2 B. & Ald. 637, 143; Tarleton *vs.* Stainforth, 5, T. R.; 5 Scott, 431; 2 Wm. Saund 96 a. n.; 11 Johns. 168, Jackson *vs.* Veeder; 3 East. 441; 3 Burr 1446; 4 Term 87; Shep's Touch 81, 82; Finch's Law 60; 4 Gr's Cruise ch. 21, Sec. 7; 2 Cains 254; 3 Johns. Cases 180; 5 Greenleaf 336; 10 Vesey 225; 3 Blackford 201; 7 Blackford 66; 6 Clarke 145; 6 Blackford 431; 2 Mo. 43; Isherwood *vs.* Oldknow 3 M. & S. 382; Leroy *vs.* Beard, 8 Howard 465; Com. Dig., Power 1 and c. 6; 1 Bl R. 283; Nind *vs.* Marshall, 1 Brod. & Bingh. 319; 10 Wend. 219, 252, 218; 1 J. J. M. 292; Sulley *vs.* Forbes, 4 Moore 448; 5 Peters 349; 6 Hill 338; 3 D. &. E. 757; 4 D. &. E. 177; 5 Es. Ca. 72, note 65; 15 East. 45; 2 Camp. N. P. 555; 6 Cow. 354, 359, 358, 357; 9 Wheaton 648; 2 H. Bl 618; 10 Wendell 218; Ambler 186; Story Agency, Sec. 58; Salk 283; 13 Wendell 527; 2 Pick. 345, Bell's Com. Law 410; 2 Kent 618; 7 Mo. 420 Tate *vs.* Hopkins; 1 J. J. M. 282, 287; 23 Wendell 268; 3 Wash. C. C. 151; 2 Wash. C. C. 133; 4 Wash. C. C. 551; 7 Barn. & Cres. 278; 1 Peters 290; 17 Pick 222; 1 Metcalf 378; 5 Wheat 326; Bac. Abr. Covenant F; 5 D. & E. 564; 2 Bro. Ch. 638; 5 Johns 58; 12 Johns. 436; 13 Johns. 365; 7 Johns. 390; 5 Conn. 229; 1 Mich. 421; 8 Howard 466; 1 Vernon; 1 Sugden on Powers p. 1; 2 Gr's Cruise top page 236; Bouvier L. D. Tit. Powers 361; 4 Kent Com. 334; 2 Wash. Real Prop. p. 300; 5 Barn. & Ald. 628; 11 Mass. 29; Dolton *vs.* Cain 14, Wallace 474.

See stipulations in the case for agreed facts.

Second. The acknowledgement of the deed made by Hughes to Whitsitt, as Attorney in fact for Holladay, in the first instance

was proper, and the re-acknowledgement cured any defect if such existed ; and the acknowledgement of a deed is no part of it.

5 Cranch 22 ; 5 Binney 276 ; 6 Binney ; 435 ; Peters C. C. Rep. 188 ; 1 Gilman 106, 160 ; 4 Gilman 454 ; 12 Ills. 273 ; 39 Cal. Rep. 603 ; 1 Doug. Mich. 106 ; 2 Serg. & Rawle 80 ; 5 Peters 132 ; 7 Mass. 14 ; 13 Peters 171 ; 2 Cush. 337 ; 11 Ala. 997 ; 1 Har. & McH. 141 ; 22 Vt. 274 ; 2 Hill on Real Prop. 283 ; 2 Ind. 385 Jordan *vs* Corey ; Stat. of Colorado Title Conveyances ; 8 Peters 88 ; 4 Ills. 322 ; 6 Conn. 198 ; 15 Serg. & Rawle 72 ; 16 Serg. & Rawle 35 ; 2 Peters 380 ; 15 Ind. 234 ; 4 Wis. 143 ; Wis. Dig. 148 ; Cowper 204, 211, 212 ; Story on Const. 157 ; Kent Com. 534, 536, note ; 1 Mass. 60 : 2 Mass. 534 ; 12 Metcalf 165 ; Co. Litt. 35, c ; 3 Dane Abr. 354 ; 4 Kent 456 ; 1 Serg. & Rawle 72 ; Cruise Dig. Tit. 32, c, 2 Sec. 60 ; 1 Lev. 25 ; Pet. Abr. 664, 665 ; 1 Stark Ev. 335 ; Phil. Ev. pt. II, c 8 Sec. 1 ; 9 Dow & Ry. 972 ; 7 Barn. & Cres. 12 ; 3 Mass. 16 : 16 Barb. 61 ; 12 Ills. 302 ; 1 Brightly's Dig. 497 Sec. 221 ; 2 Scam 315, 317 ; 13 Ills. 186 ; 17 Mo. 561 ; 32 Ills. 348, 523 ; 2 Scam 374 ; 2 Blackford 32 ; 5 Blackford 92 ; 32 Ind. State *vs* Griswold ; 26 California 393 ; 19 California 551 ; 2 Bouvier L. D. 546 ; 2 Caines Rep. 169 ; Bro. Parl pt. 72 ; Bac. Abr. h. t. G. ; Sugden on Powers p. 1 ; Sedg. on Stat. & Cons. Law p. 38 ; 4 Kent 456 ; Legal News 4th Vol. p. 75, U. S. C. C. case, Gaslight Co. *vs.* Knowles ; 2 Cal. 243, People *vs.* Crayscroft ; 13 Wis. 188 Myrick *vs.* Millan ; 3 Legal News 181 ; Pet. C. C. Rep. 433 ; 15 Peters 290 ; Statute of Colorado, 1861, Title "Conveyances" and "Dower"; See stipulations or agreed case in the Record ; 6 Sergeant & Rawle, Peck *vs.* Harriott 146.

Third. The signature to the deed made by Hughes, as Attorney in fact for Holladay, to Whitsitt for the lots in controversy, namely, "Ben Holladay, by his Attorney in fact, B. M. Hughes," was sufficient.

See stipulations in the Record and agreed case therein.

Lyon *vs.* Kain, 36 Ills. 367, 368 ; 26 Ills. 54 ; Devinny *vs.* Wilson, 2 Watts & Serg. 328 ; 2 Hill on Real Prop. p. 350, Sec. 12 ; 5 Ind. 269 ; 2 Washburn on Real Prop. 588 ; Statutes of Colorado 1861, Title "Conveyances."

J. W. Denver
For dft. in error.

In the Supreme Court

OF

THE UNITED STATES.

IN OCTOBER TERM, 1873.

BEN HOLLADAY, Plaintiff in Error,
vs. } Error.
ANTHONY DAILEY, Defendant in Error.

BRIEF OF AUTHORITIES

Cited for the Defendant in Error by his Counsel.

Supreme Court of the United States.

DECEMBER TERM, 1872.

BEN. HOLLADAY, PLAINTIFF IN ERROR,

vs.

ANTHONY DAILEY, DEFENDANT IN ERROR.

Error to the Supreme Court of Colorado Territory.

ARGUMENT AND BRIEF OF AUTHORITIES FOR THE DEFENDANT IN ERROR.

The counsel for the defendant in error refer to the record sent up to this court from the supreme court of Colorado Territory, as containing the stipulations of the counsel of both parties to this suit, in regard to the facts involved in the case, for a copy of the power of attorney given by the plaintiff in error and his wife to Bela M. Hughes, to sell the lots in dispute—for a copy of the deed made by said Hughes, as attorney in fact to one Whitsitt for the same—as well as for a copy of all the certificates of acknowledgment and official certificates accompanying, annexed, or appended to each of said instruments in writing.

Upon the question of the legal sufficiency of the power of attorney aforesaid, and of the deed made under it from the plaintiff in error, by Hughes, his attorney-in-fact, to pass the legal title of said plaintiff in error, Holladay, in certain town lots, the matter in controversy, to Richard E. Whitsitt, and through said Whitsitt to the defendant in error, the

counsel for the said defendant offers the following argument with the authorities supporting it, cited in connection therewith.

First.—It is urged by the counsel for the defendant in error that the name of Holladay's wife should have been signed to the deed made by Hughes to Whitsitt. We reply: the power shows that though Holladay and wife joined in making it, it was given to Hughes to sell land of *Ben. Holladay alone*; that this was the substantial and only object of the power; the acknowledgment of the wife of Holladay shows the interest she intended to relinquish in the execution of the same, was a right to dower.

The statutes of Colorado gave her no dower in the lands. That statute reads as follows:

"SEC. 1. A *widow* shall be endowed of the third part of all the lands whereof her husband shall die seized of an estate of inheritance. Equitable estates shall be subject to the widow's dower, and all real estate of every description contracted for by the husband in his lifetime, the title to which may be completed after his decease." (See statute of Colorado, entitled "An act concerning dower," approved November 7th, 1861, page 362.")

It appears by the power that she had no legal interest, or any whatever, in the property. (Stat. Colorado, 1861, Tit. "Dower.") Her name to the deed would have passed nothing to Whitsitt; her covenants would not have bound her; nothing that she could do in person or by attorney would have added any validity to the sale; would have relieved her husband of any burden, or bound her to share any with him.

The object of the power, the substance of it, was to enable Hughes to sell Holladay's land, and this object must be kept constantly in view.

This object and purpose of the power the plaintiff contends

must be defeated, because the wife's name was not signed to the deed to Whitsitt.

The counsel for plaintiff below quoted Lord Coke, (Story's Agency, Sec. 166,) to establish the general principle, which he supposed would sweep away the validity of the deed in question, but he did not quote all which that judge said, and we beg leave to add what follows immediately next in Story's quotation from Coke, viz: "Yet both these rules have divers exceptions and limitations," and, says Story, "Lord Coke is *well warranted* in suggesting that there are exceptions and limitations."

The counsel for the plaintiff seemed to lose sight of, or keep out of view, in all his argument the fact that the thing which the attorney was to perform was *a sale of the land* of Holladay, and that the sale of the land was made.

It does not appear anywhere that the attorney did less than his power authorized him to do, in effecting the object of it, for his authority was to sell the land.

It is evident from the power what the parties intended; what their object was in granting it, and what they intended by joining the wife with her husband, viz: to pass, if she had any, her *dower* to the land. It was their design to provide that such estate, if she had it, might, if it could be done, be relinquished in favor of the purchaser. This intention is too clear for dispute.

Now, if the object of the power was as stated, and the intention of the donors simply to join the wife with the husband that her dower might be relinquished, if she had any—and the fact was that she had none—is the sale of Ben. Holladay's land, and the proper conveyance thereof, to be held invalid? The authorities properly quoted, having direct application to this case, do not reply in the affirmative.

The object of the power, then, was to enable the attorney to sell the land of Ben. Holladay, situated in Colorado Territory.

This being the object of the power, then the deed in question effected that object, and thus executed the power.

See Dalton *vs.* Cain, 14 Wallace, 474.

The power was to sell land in Colorado, and the law presumes, that it included the power to transact the business, in the forms and by the instruments, and according to the laws of the place where the land lay.

Story's Agency, sec. 86.

In Colorado, the attaching of the name of the wife to the deed was of no importance, as before stated, not required by the statute to convey a legal title to the purchaser, she having no dower, would have been a merely "formal circumstance," and not needed to effect the object.

If the substance of the power was that the attorney might sell certain lands of Ben. Holladay, the sale and conveyance to Whitsitt following that substance, the omission of the name of the wife to the deed, a "circumstantial variation in the execution," will not defeat it.

Batty *vs.* Carswell, 2 Johns., 48.
Nixon *vs.* Hyserott, 5 Johns., 58.
Com. Dig. "Attorney," 15.
N. River Bank *vs.* Aymar, 3 Hill, 279.

If the act done by the attorney does not substantially vary from the authority or commission, in its nature or extent or degree, it is valid, and no matter of mere form can render it void.

Story on Agency, Sec. 195, and notes 4, 5, and 6.

Again, Story says, "the general principle which pervades all these cases is the same: that the principal is not bound by the unauthorized acts of his agent, but is bound, when the authority is substantially pursued, or so far as it is distinctly pursued."

"And," further he says, "the true inquiry, therefore, in

all such cases, is, what, under all circumstances, is the true nature and limit of the authority. If it is exceeded in any *substantial* manner, it will not be obligatory on the principal."

Story on Agency, Sec. 172.

Tried by these general principles the deed in question must be held valid.

In Wilson *vs.* Troup, 2 Cowan, 228, Woodworth J., says, passing upon the execution of a power, "it is well settled that in the construction of contracts, the *situation* of the parties, and the *subject-matter* of their transactions, may be taken into consideration in determining the meaning of any particular provision. Extraneous evidence is admissible, so far as to ascertain the circumstances under which the writing was made, and the subject-matter to be regulated by it," and quotes the cases of Sumner *vs.* Williams, 8 Mass., 214; Fowle *vs.* Bigelow, 10 Mass., 384; Whalen *vs.* Kaufman, 14 Johnson, 104. Sutherland J., says, in passing on the same question in the same case: "If, then, it be a just rule of construction as applicable to powers of attorney that no authority is to be deemed to pass by them, but such as the terms used necessarily import in their most restricted legal sense, it would perhaps follow that an authority to mortgage would not authorize the sanction of a power to sell. But, I apprehend, that such is not the rule of construction by which powers are tested."

"Sugden," says he, "lays down the rule thus: In considering the extent of a power, the intention of the parties *must be the guide*. Thus, on one hand, a power limited in terms, has, *in favor* of the *intention* been deemed a *general power;* whilst on the other hand a general power in terms has been cut down to a particular purpose, and this position is fully supported by the authorities." Further, he says: "In Tankerville *vs.* Coke, (Mose., 146,) it was held that a power should be so construed as not to effectuate the intention of the parties." There an act had been done which the

terms of the power authorized, but which was evidently *against the intention* of the parties. He says, also, in Ren *vs.* Bulkeley, Lord Mansfield said, "The creation, execution, and destruction of powers, depend on the *substantial* intention and purpose of the parties," and cites Bristow *vs.* Ward, 2 Vesey, Jr., 336; Talbot *vs.* Tipper, Skinner, 427; Mildmay's case, 1 Co., 175 A; Liefe *vs.* Saltingstone, 1 Mod., 189; 1 Freeman, 149, 163, 176, same case, all which establish the same doctrine. He says, also, "that in construing a power of attorney, therefore, in order to ascertain whether it has been well executed, the letter of instrument is not to be exclusively regarded, but the important inquiry is—have the intentions of the parties been carried out?"

The counsel for plaintiff, cites the case of Batty *vs.* Carswell, to support his theory. This was a case where A gave to B authority to give his note, at six months, to C, but B gave a note payable in sixty days.

2 Johns., 48.

We respectfully submit that this case has no bearing on the case in consideration. The substance of this power was to *give a note at six months*, and it was not pursued. It will surely require great legal ingenuity to make this case apply here. It is so palpably irrelevant that we dismiss it without further notice.

In the case of Vanada *vs.* Hopkins, 1 J. J. M., 288, Underwood, J., said, passing on a power of attorney: "All powers conferred must be construed with a view to the design and object of them, and the means most usual to, and proper for carrying their design and object into effect; having respect to the language which the maker of the power employs to convey his meaning and intent."

Now, let us inquire who had the power to dispose of the land in question? Ben. Holladay, the sole owner. Could his wife have sold any interest therein? No. His wife had no interest that she could convey by joining him or otherwise.

Then, if (as the power shows) the object it had in view was the sale of his land, the *intention and design* of the power will be effectuated by sustaining the deed, as the cases cited abundantly prove.

It is certainly beyond all dispute, the fact that Holladay and wife united in the power, simply to pass a right of dower, which she did not possess.

If the deed had been signed by both of them, it would not have transferred anything more than the deed signed by Holladay alone; then, whence the necessity of her signature?

The attorney for plaintiff, says, that no one knows what they meant by uniting together—that we have no right to know or inquire. The courts of the land, ever ready to sustain the substantial execution of contracts of this nature will look at the power; see therein the ownership of the land, whose property was to be sold, the relation of husband and wife, what interest they supposed she possessed; in short, will see that the substance of the power, was the sale of his sole property, and that the deed has reached that substance in the only rational way it could have reached it, and acted upon it.

Counsel seems to have forgotton that the married woman's existence is merged in that of her husband; that, after marriage, her legal identity is gone. Thus, a deed made by husband and wife to the husband's land, is not the less valid as to him simply, because she has signed the same conveyance. It is his deed alone. Why? Because she was not a necessary party to the deed in consequence of her lost identity in a legal sense. Now, if in this instance, for the reason given, the deed must be treated as the husband's deed alone, why is not her union with her husband in executing a power to sell his separate estate, in which she had not even a dower, equally nugatory and superfluous?

It is an every day occurrence, in the states where dower prevails, that deeds in which a wife joins with her husband that her dower may pass, if not in conformity with the statute

which regulates her acknowledgment, though held inoperative as to her, are binding on the husband.

Litt., Sec. 221, Barber *vs.* Harris, 15 Wend., 617.
Bracton., Liber 5, f. 4, 1, 6,
5 Grattan, Shranks *vs.* Lancaster.
Shartzer *vs.* Love, 40 California.

Smith's Merc. Law, p. 115, was quoted by counsel for plaintiff, but it appears that he incautiously passed by the *full text.*

Smith, p. 115, says: "The general rule is, that the authority of whatever description, must be strictly pursued, otherwise the principal, if his agent be a particular one, will not be bound, and if he be a general agent will not be bound, save under the circumstances above described, and not under any circumstances whatever, if the third party at the time of his contracting was, or ought to have been, aware of the limited extent of the agent's authority which is construed by the courts with a great deal of strictness—thus, if given to two, it cannot be executed by one, though the other should die or refuse, and, if given to three, *jointly or severally*, it cannot be executed by two, though it may be by all three or one only." "*However*," (in the same paragraph and following,) he says: "The courts are now disposed to relax from the technical precision of ancient times in construing these and like words, and will search the whole instrument for the maker's *intention*, but when that is once ascertained, they will confine the agent to it with the utmost strictness."

This citation does not help the plaintiff. His counsel is unfortunate in citing the insurance case; in it the substance of the authority, and the intent of the donor was, that Barron and Stewart should take out insurance in their two names. They added another name to the policy; took one out in the name of themselves and Smith; they violated the substance of the power as well as its plain intent.

Counsel stated a case of a party, who ordered his agent to sell land to B and C, which he did not do, but sold and conveyed to B alone.

The attempt to apply this to the case in hand under the quotation that "If a man doeth less than his command" his act shall be void, displays again the ingenuity of the counsel, but the weakness of his case.

The agent was authorized to sell and impliedly to give a deed to certain named persons. This was the substance of the power and directly ordered to be carried out, and there were no features accompanying the power, which could give rise to a question as to object of the power, or the intention of the maker.

In this case there was not a doing *less* than the attorney was empowered to do; he was doing something he had no authority to do whatever.

Justice Parker, we agree, lays down one of the rules in regard to the admission of parol evidence, to contradict a written contract; but we would remark that the counsel has misapprehended when he states that it was applied in the case of Batty *vs.* Carswell. We refer to the case for the correctness of our assertion.

See Stackpole *vs.* Arnold, 11 Mass., 29.

The counsel for plaintiff seemed greatly enamored with the misquoted rule given by Lord Coke, yet left out the statement of the exceptions and limitations added by the same judge.

We have before had occasion to call attention to this quotation, and the limitations and exceptions connected with it. We shall drop it hereafter and pass over the comments this emasculated rule has called forth.

But we could in this connection ask the court to consult the cases cited by Washburn to sustain his statement, "the appointment of a less estate under a power, than what the donee might have created, is not thereby rendered invalid,"

and to prove that it is necessary in examining the rule given by Coke, to give heed to its qualifications.

2 Washburn on Real Prop., 2d Ed., 621.

4 Cruise Dig., 205.

We would call attention to the following, on page 563 of Am. Leading Cases, following the comments of the compilers in the case of Batty *vs.* Carswell, and other cases, and the authority cited by counsel for plaintiff on page 561.

"*But in all cases* an authority is to be construed, and the intention of the principal to be ascertained in reference to the purpose of the appointment, and a consideration of the object which the agent is directed to accomplish will either expand the power specified as a means of executing it, or limit the exercise of the most general powers conferred. Accordingly, it is a general maxim applicable to special and limited agencies, as well as to those which are more comprehensive and discretionary, that in the absence of such prescription of the manner of doing the act, as implies an exclusion of any other manner, an authority or direction to do an act, or accomplish a particular end, implies and carries with it authority to use the necessary means and inducements, and to execute the usual legal and appropriate measures proper to perform it; or, as it has been expressed, "the principal authority includes all mediate which are necessary to carry it into effect." The Editor refers to Peck *vs.* Harriott and another, 6 Serg. & R., 146, 151.

In this connection we would call attention to Dunlap's Paley on Agency.

The text of the author says: "Indeed, all written powers, such as powers of attorney, or of instruction; receive strict interpretation, the authority never being extended beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect," and then cites the case of Munnings under this rule, which does not resemble the case under consideration. The American note on same page

(note 9) sums up the decisions made in regard to that text, as follows: "In construing powers, the end and design of the parties, and the substantial rather than the literal execution of them is to govern. Thus, when the intention requires it, a power limited in its terms has been deemed a general power, and a general power deemed to be for a particular purpose," and cites no less than thirty-six cases of decisions of the courts of the States to sustain this qualification.

Dunlap's Paley on Agency, 192, and notes 3 and 9.

Another case was cited by counsel for plaintiff twice in his argument, (Chase *vs.* Dana, 44 Ills., 202.)

This case was a plain one, in which no question as to the object or intention of the principal could arise. A authorized B to confess judgment on a note dated April 24, 1846. B confessed judgment on a note dated April 24, 1856, and the judgment was decided null.

The court in passing on it, alluded to a general rule regulating the execution of powers, without alluding, as it was unnecessary in the case, to qualifications and exceptions we have cited. This case, it will be seen, does not help the counsel out of his difficulty.

The counsel also cited Snow *vs.* Perry, 9 Pick, 541, which is in no respect similar to the case in hand, in which the court briefly gives some general rules sufficient to control that case.

The case of Gibson *vs.* Colt, cited by counsel, is confessedly bad law all over the Union, and has been expressly overruled in the same State in Nelson *vs.* Cowen *et als.*, 6 Hill, 336, 338, and 23 Wend., 267, 13 Wend., 521. It has no bearing on this case at all.

The case of Tate *vs.* Hopkins, 7 Mo., 420, was also referred to by counsel for plaintiff. This case was simple. A was authorized to draw on E and D at four months, but he actually drew a month later, and antedated the bill to make it payable in four months from the date of his authority.

The draft was held invalid, and for the reason clearly, that it was evident that E and D *intended* that he should date his draft of the day *he did draw it.* Here the intention of E and D was implied, and not gathered from the language of their authority, and if it has any bearing on this case does not favor the plaintiff.

The counsel cited also Rossiter *vs.* Rossiter, 8 Wendell, 500. This case simply decides that a power to collect debts, execute deeds, and accomplish a complete adjustment of all concerns of the constituent, in a particular place, and do all other acts which he could do in person, does not authorize *the making* of a note to bind the principal. If this case has any bearing here we are unable to see it.

The judge in his opinion lays down a general rule without any qualifications, for there was no necessity to allude to them at all. The court quotes Gibson *vs.* Colt, 7 Johnson, and Nixon *vs.* Hyserott, 5 Johnson, in making up its opinion, both of which cases are overruled in 6 Hill, 23 Wend., and 13 Wend., above cited.

It is needless to remark on general rules further than to say that there are many in the books, but that experience and sound judgment have established the limitations and restrictions admitted by Coke and applauded by Story, and that without these there would be a failure of justice in cases without number, and an utter disregard of the golden maxim, "He who adheres to the letter, sticks in the bark."

Germain to this discussion, we ask that the case of Guthrie *vs.* Armstrong, 5 Barn. and Ald., p. 628, be examined. It was this: A gave power to fifteen persons, naming them as his attorneys "*jointly and separately*" for him, and in his name to sign and underwrite all such policies of insurance as they, his said attorneys, or *any of them*, should jointly or separately think proper.

The policy was executed for the defendant by four of the persons named in the power. Counsel urged that the power being to fifteen jointly or severally, was not executed by all or any one of them "and invalid."

The court held that it should "look at the whole instrument to ascertain its meaning." This is the substance of an old case, which sustains with the multitude of other cases, the argument we make. Coke, for whom the counsel for plaintiff seemed to entertain the highest regard, says, (Coke Litt., 283:) "The law of England respects the substance of the matter, and not every nicety of form and circumstance," and Lord Mansfield says, (in Cowper, 600, Goodtitle *vs.* Bagley:) "The reason and spirit of cases make the law, and not the letter of particular precedents," and in the same case, "Deeds then shall be so construed as to operate according to the intention of parties, if by law they may, and if they cannot in one form, they shall operate in that which by law will effectuate the intention. *Quando res non valet ut ago, valeat quantum valere potest.*" "For in these later times," says the court, (in 3 Lev., 370,) "the judges have gone further than formerly, and have had more consideration for the substance, to wit, the passing of the estate according to the intent of the parties, than the *shadow*, to wit, the manner of passing it," and this opinion is cited with approval in many cases, viz: Lewis *vs.* Davis, M. & W., 516; Smith *vs.* Packhurst, 3 Atk., 136; Cholmondely *vs.* Clinton, 2 B. & Ald., 637; Tarlton *vs.* Staniforth, 5 T. R.; Borradaile *vs.* Hunter, 5 Scott N. R., 431; 2 Wm. Saund, 96 a. n.; Gibson *vs.* Minet, 1 H. Bla., 614, 620.

To strengthen our argument also, we cite the case of Jackson *vs.* Veeder, which was as follows: A by will devised certain land "unto such of *his* sons and *his* heirs and assigns forever, as shall agree and live best with their mother," (which was to be signified by an instrument in writing, under her hand and seal,) with proviso that the same should serve as a part of the portion of *such son*, as his wife should select. The wife gave the land to three of the sons named in the will. The settlement was held valid. The point raised against it was, that the settlement on three

was not right, and should have been on one only, the *words* of the will considered.

The C. J. said, "the general rule of law is, that the execution of a power must be according to the substantial intention and purpose of the party creating it; not restraining or lessening it by a narrow and rigid construction, nor by a loose and extended interpretation dispensing with the substance of *what was meant to be* performed. (Doug., 280; 3 East., 441.) Powers are to be construed *equitably in a court of law*, as in a *court of equity*, (3 Burr., 1446.) And the *general* intention must be carried into effect though it may defeat a particular intent, (4 Term., 87.) Testing the power given in the will by these rules of construction it is evident thas the general intention of the testator was to place the farm, of which the premises in question are a part, at the *disposal of the wife*, to enable her to live comfortably and command the care and attention of some of her sons, for it was devised to *such of his sons*, as should live best with their mother, of which she was to judge. If this was the *general intent* and she *supposed* the object best answered by the designation of *three*, it was within the general object of the power, although the testator might have intended to designate only one. It would then fall within the rule, that the *particular* must yield to the *general* intention. (Jackson *vs.* Veeder, 11 Johns, 168.)

"The provision was *intended* for the *benefit of the wife* and not for the son, whom she should designate, for it was to go as a part of his portion, and his other sons to take lands in lieu thereof.

"No *possible injury* could therefore accrue to the other sons, whether the designation was to one or more. It is not certain that the testator intended to designate one of his sons. The grammatical construction will not altogether bear out this interpretation, though it best comports with the probable intention of the testator. This would be too narrow and rigid a construction to carry into effect the *real and substantial* object of the power."

How compares this with our case in hand?

The power itself of Holladay shows that the "real and substantial object" of it was to have his lands sold by Hughes; that they were his sole property by admission of

his wife in it, as well as in the acknowledgment she made to the deed.

The Colorado statute, approved November 7th, 1861, sec. 1, page 362, above recited, shows that she had no dower at all, and hence she had no estate, her husband being yet living, and that statute in force when the deed to Whitsitt was made.

If she had no real interest in the property, and no dower, she was not capable of conveying anything, and her name was a dead letter in and to the power, and would have been if affixed to the deed. (Broome Leg., Max., 364.)

Her incapability to convey any title to the lots, however, does not render the power and the deed under it invalid as to Ben. Holladay.

Shep. Touch., 81, 82.
Finch Law, 60.
4 Gr. Cruise, chap 21., Sec. 7.
2 Caines, 254.
3 John's Cases, 180.
5 Greenleaf, 336.
10 Vesey, 225.
3 Blackford, 201.
7 Blackford, 66.
6 Clarke, 145.
6 Blackford, 531.
Dalton *vs.* Cain, 14 Wallace, page 474.

To this end we deem it only necessary to give a few authorities, and to remark that it must be seen at once that if she was incapable to join with her husband in making the power, her name in that connection stands as though it *had not been used at all*, and the power granted stands as the power of her husband only, and this position is fortified by the fact that, if she had been joined in the execution of the deed to Whitsitt, the deed would have conveyed nothing more, nor bound her in any way, for she was "incapable" to convey

anything, or to bind herself in any manner as already argued.

Still further to pursue this subject of the construction of powers. In Bank of Mo. *vs.* McKnight (2 Mo., 42) the court said: "It is now well settled that when an attorney does what he has authority to do, and more, that the act is good to the extent of his authority, and there is no reason why it should not be good where he stops short of his authority, if the object of the power is accomplished."

Now, we ask, was the object of the power to make a deed signed to Holladay and wife, or was it to confer power on Hughes to sell Holladay's land?

This question will only be answered in one way by any ordinary mind.

The counsel for the plaintiff again and again alluded to the rule which Coke gave, as to an attorney doing *less* than he was ordered to do; in fact, this misquoted text has been unto him as the "harp of a thousand strings." He constantly relies on Hughes having done *less* than he was authorized to do, because he did not sign the wife's name to the deed, and thus is found constantly asserting that the *object*, the substance of the power, the grand intent of the donor was the *making* of a deed and the *form* thereof; and the sale of Holladay's lots a matter of minor importance belonging to shadow and not to substance.

Such a position is not warranted by reason or authority; finds no support in any case cited for plaintiff, and might be dismissed without further criticism.

It is not the law, absolutely, that if an attorney do less than his power allows him to do, what he may do is invalid. The rule is qualified and explained, and the cases in which it is applied have no resemblance to this at all.

See Isherwood *vs.* Oldknow, 3 M. and S., 382.

The law as we read it is, that the doing *more* or *less* by an attorney which may affect his acts is the doing *more or less* in and about the *substance* and *intent* of the power granted.

This view, reason, authority, and common sense all concur in sustaining.

Having hitherto, in this argument, resorted to State decisions, we now approach the opinion of a higher tribunal [the Supreme Court of the United States] in regard to the construction of powers.

In Le Roy *vs.* Beard, 8 Howard, Judge Woodbury in discussing the construction of powers, says, "and although a grant of powers is *sometimes* to be construed strictly, (Com. Dig. Power, 1 and c. b., 1 Bl. R., 283,) yet it does not seem fit to *fritter* it away in a case like this by every *nice* and *metaphysical* distinctions, when the general *tenor* of the *whole* instrument is in favor of what was done under the power, and when the grantor has reaped the benefit of it by receiving a large price that otherwise would probably never have been paid, (Nind *vs.* Marshall, 1 Brod. and Bingh., 319; 10 Wendell, 219, 252.) This he must refund, when the title fails, or be accessory to what seems fraudulent, (1 J. J. M. 292.) Another circumstance in support of the intent of the parties to the power of attorney to make it broad enough to cover warranties, is *their position* or situation as disclosed in the instrument itself.

Sully *vs.* Forbes, 4 Moore, 448.

"Le Roy resided in New York, and Starr was to act as his attorney in buying and selling lands in the 'Western States and Territories,' and this very sale was as remote as Milwaukie, in Wisconsin. For ought which appears, Le Roy, Beard and Starr were all strangers there, and the true title to the soil little known to them, and hence they would expect to be required to give warranties when selling, and would be likely to demand them when buying.

"The usages of this country are believed also to be very uniform to insert covenants in deeds. In the case of the Lessee of Clarke *vs.* Courtney, 5 Peters, 349, Justice Story says: 'This is the common course of conveyances' and that in them 'covenants of title are usually inserted.' See also 6 Hill, 338. Now, if in this power of attorney no expression had been employed beyond the giving an authority to sell and convey this land, saying nothing more extensive or restrictive, there are cases which strongly sustain the doctrine

that from usage as well as otherwise, a warranty by the agent was proper and would be binding on the principal. It is true that some of these cases relate to personal estate and some perhaps should be confined to agents, who have been long employed in a particular business, and derive their authority by parol, no less than by usage, and consequently may not be decisive by analogy to the present case; 3 D. and E., 757; 5 Es. Ca., 72, note; 15 East., 45; 2 Camp. N. P., 555; 6 Hill, 338; 4 D. & E., 177. So of some cases which relate to the quality and not the title of the property. 6 Cowen, 354; 9 Wheaton, 648; 6 Hill, 338.

"But where a power to sell or convey is given in writing, and not aided as here by language conferring a wide discretion, *it still must be construed* as intending to confer all the usual means or sanction the usual manner of performing what is intrusted to the agent. 10 Wendell, 218; Howard *vs.* Baillie, 2 H. Bl., 618; Story's Agency, p. 58; Dawson *vs.* Lawley, 5 Es. Cas., 65; Elkins *vs.* Maclish. Ambler, 186; Salk., 283; Jeffrey *vs.* Bigelow, 13 Wendell, 527; 6 Cowen, 359. Nor is the power confined merely to usual modes and means, but whether the agency be special or general, the attorney may use appropriate modes and reasonable modes such as are considered within the scope of his authority. 6 Hill, 338; 2 Pick. 345; Bell on Com. Law, 410; 2 Kent, 618; 1 J. J. M., 282; 23 Wendell, 268.

"We have already shown that under all the circumstances a covenant of warranty here was not only usual but appropriate and reasonable.

"Again, all powers conferred must be construed with a view to the design and object of them. (1 J. J. M., 287.) Here the design was manifestly in the discretion of the agent '*to sell as he might deem most advantageous.*' Again, if a construction be in some doubt, not only may usage be resorted to for explanation, but the agent may do what seems from the instrument plausible and correct, and though it turn out in the end to be *wrong*, as understood by the principal, the latter is still bound by the conduct of the agent.

"3 Washington C. C., 151; 2 Washington C. C., 133; 4 Washington C. C., 551; 6 Cowen, 358. Because the person who deals with that agent is required like him to look to the instrument to see the extent of his power. (7 Barn. and Cres., 278, 1 Peters, 290,) and if it be ambiguous, so as to mislead them, the injurious consequences should fall on the

principal for not employing clearer terms. 2 Barn. and Ald., 143; 1 Peters, 290; 4 Washington C. C. 551; 23 Wend., 268.

"In the next place, the acts of the parties themselves tend here to strengthen the construction of the words in the power, so as to authorize a warranty, and these acts it is competent to consider in order to remove doubt. 17 Pick, 222; 1 Metcalf, 378; Paley on Agency, 198; 5 Wheaton, 326; Bac. Ab. Covenant F; 5 D. and E., 564. The acts of the agent on this subject are strong. He construed the instrument as if empowering him to make the warranty, and made it. He was to gain nothing for himself by such a course, if wrong, and does not appear to have done it collusively with anybody. 2 Bro. Ch., 638.

"Finally, the decided cases on this question, though in some respects contradictory, present conclusions as favorable to this construction, as do the peculiar language used in the power and weight of analogy. 23 Wendell, 260, 267, 268; 6 Hill, 336, &c.

"Some earlier cases were *contra*. Nixon *vs.* Hyserott, 5 Johnson, 58; Van Eps. *vs.* Schnectady, 12 Johnson, 436; Ketchem *vs.* Evertson, 13 Johnson, 365, and 7 Johnson, 390. But in these the power was merely to give a deed of a certain piece of property, and could be construed as it was without directly impugning our views here, whereas in the present case, the power was manifestly broader in terms and language. Wilson *vs.* Troup, 2 Cowen, 195; 6 Cowen, 357.

"The *earlier cases in New York* are also considered overruled by the later ones." (Bronson J., in 9 Hill, 336.)

Thus far Judge Woodbury.

We have thus quoted the greater part of the leading United States case, applicable to the one in consideration, and applicable to the argument of the counsel for plaintiff, as far as we have considered it.

It seems that all the main features of, and facts in the case of Le Roy *vs.* Beard, are strikingly similar to the facts in the case under discussion.

First. The agent of Le Roy was authorized to sell "on such terms in all respects, as he should deem most advanta-

geous," and again, "on such terms in all respects as he deem may most eligible."

Hughes was authorized to "sell on such terms as he may consider best for their interest." The language is *identical* in substance with that in the power executed by Le Roy, and it remains to be seen whether any court will "think fit to fritter it away by very nice and metaphysical distinctions, when the general tenor of the whole instrument is in favor of what was done under the power."

Story *vs.* Benedict, 5 Conn , 229.
1 Mich., 421.

Second. "The situation of the parties as disclosed in the instrument," was identical substantially with that of the parties to Le Roy's power. Holladay and wife resided in "New York," and the sale was as remote as "Denver in Colorado." Hughes resided in "Kansas," and for ought which appears they were all strangers there, and the true title to the soil, little known to them as the court says it was to Le Roy, Beard and Star, when the power of Le Roy was made.

Third. The agent was to gain nothing for himself by such a course, if wrong, and does not appear to have done it collusively with anybody, as in the Le Roy case.

Hughes could gain nothing by putting Holladay's wife's name to the deed; and what is more, neither she nor her husband could lose anything by its omission, or suffer any bad consequences whatever thereby.

Up to this point, we have discussed this case without presenting a feature in the power of Holladay to Hughes, which, independent of all that has been said by us in reply to defendant's counsel, confronts and defeats absolutely the position he has taken in the point under discussion, viz: the construction of powers.

We allude to the power given to Hughes "to sell on such *terms* as he may consider best for their interest."

This clause, the court will see, gave him the right, without

doubt, to execute a conveyance, if he thought proper, without adding the name of the wife, who had not the slightest interest in the estate. The spirit, intent, and object of the power was, that he might dispose of that estate, and in any way he might think proper for their interest. Now, when he arrived in Colorado, and ascertained that the wife had no dower in the estate, and he thought it the safer plan, and the best, in his judgment, not to use the wife's name in making a conveyance, not to put her name, which would have been without meaning or purpose, to the deed to Whitsitt; he had the power to omit it by the very words of the power itself.

This important, this controlling language in the power, the counsel for plaintiff has not alluded to, and for a reason quite evident.

To render this argument for the defendant conclusive, we cite the language of Judge Woodbury in the Le Roy case, (8 Howard, 466:)

"That the language above quoted from the power of attorney is sufficient to cover the execution of such a covenant, (warranty) would seem *naturally* to be inferred, *first*, from its leaving the 'terms' of the sale to be in all respects as Starr shall deem most advantageous."

"Terms" is an expression applicable to the *conveyances and covenants* to be given as much as to the *amount of* and the *time* of paying the consideration.

Now, if under this view of the law, Beard could give a covenant of warranty, could perform so important an act, one that would affect directly and seriously Le Roy and his heirs for uncounted years, we would like to have a reason why Hughes could not drop the name of the wife in the deed to Whitsitt, an act which did not in the slightest degree affect injuriously the husband or wife; but an act, which if it *could have* any effect whatever, was one *that would lessen* and not increase the responsibility of any one; indeed an

act which he should have done if the purchaser did not object, and was willing to forego the name of the wife and its mythical consequences.

In support of the contrary view, we are treated by plaintiff's counsel to metaphysical disquisitions, mysterious suggestions, signifying nothing, as well as to entirely new ideas on the relations of husband and wife. For example, the counsel says: "Suppose the wife should say to her husband, you join me in a warranty deed of my property in New York (where a *feme covert* can hold and sell real property as she pleases) and I will join you in a warranty deed of your property in Denver," and then seems to draw the conclusion that this supposed case must support an unsound theory, and give point and pertinence to his argument in that behalf.

A scene in which this imaginary proposition is started without question, would be a charming example of connubial confidence and of affectionate interest; it would present a rare illustration of the wish to have one heart, one mind, and *one account in bank*.

We may laud the gushing conjugal love evinced by the wife in such a case, in all terms of admiration, and may regret that this attractive episode finds no place for exhibition and sanction in courts of justice, but without avail, for there it is held with firmness that such a contract is beyond the power of the most devoted wife and husband to make one with another.

The counsel for plaintiff cited the case of Thruxton *vs.* Attorney General, (1 Vernon,) a case decided in the year 1685. We have had no access to the report, and are unable to know the features of the case and its applicability here. We do know, however, that the examination of cases in full is necessary to the right comprehension of them, and that excerpts and syllabi may be found without number on both sides of many legal propositions. If the case cited is of any value to support the theory of the counsel citing it, the

judges of the highest courts in this country have traveled over the same ground and have arrived at opposite conclusions, with the advantage of greater experience, and the flood of light shed on the construction of powers in the last hundred years.

The counsel for plaintiff cites from Cruise on Real Property, 2 vol., p. 236, but does not give the whole section. It reads thus: "Sec. 1. Powers of revocation and appointment were formerly directed to be executed by the tender of a ring, the payment of a sum of money, &c., but in modern times, they have in general been directed to be executed by deed, or instrument in writing, or by will. And the *execution of these powers may be restrained by such collateral circumstances, and attended with such forms and ceremonies as the persons creating such powers may think proper to require. Nor can a court of law dispense with the performance of them, without violating the intention of the parties.*"

In the work quoted, all the words from the word "Execution" are italicised by the author to the word "require."

If this authority did at all apply to powers of attorney to sell, we might be content to refer to the rule given Lord Coke, quoted by us in full, and which states that "there are certain limitations and restrictions connected with the same."

But we propose to show that this rule has nothing to do with powers of attorney *to sell land of another.*

The powers to which this rule applies are powers of revocation and appointment, in the settlement of estates in England under the Statute of Uses, and it is expressly so stated by Cruise in the extract above given.

Bouvier, in his Law Dictionary, title, "Powers," gives a lucid exposition of powers of various kinds, and we quote "3. Powers derived from the doctrine of uses may be defined to be an authority enabling a person through the medium of the Statute of Uses to dispose of an inheritance vested either in himself or another person."

Kent defines a power as "a mere right to limit a use," (4 Kent, 344.)

Sugden says, (1 Sugden, p. 1:)

"SEC. 1. Powers are either common law authorities, declarations or directions operating only on the conscience of the persons in whom the legal interest is vested, or declarations or directions deriving their effect from the Statute of Uses.

"SEC. 2. A power given by a will, or by an act of Parliament, as in the instance of the land tax redemption acts *to sell an estate*, is a common law authority. The estate passes by force of the will or act of Parliament, and the person who executes the power merely nominates the party to take the estate. A power of attorney is also a common law authority; *but the estate is not in this, as in other cases, actually transferred by the instrument creating the power.* It is a mere authority to execute a conveyance in the place of the prinpal, and the estate, therefore, must be conveyed by the attorney, with the same solemnities as would have been requisite upon a transfer executed by the principal himself.

"SEC. 3. A power to dispose of an estate or a sum of money, when the legal interest is vested in another, is a power of the *second sort.* The legal interest is *not divested* by the execution of the power, but equity will compel the person seized of it to clothe the estate created with the legal right."

Washburn says, of powers under the Statute of Uses:

"Powers as thus applied *do not come within* the popular meaning of the term, when used in reference to acts done by one as the agent or attorney of another; they derive their origin and character directly from the doctrine of uses."

2 Wash. on Real Prop., p. 300.

This disposes fairly and effectually of the authority which the counsel has relied on to sustain many ingenious propositions, and further to discuss this first point in his argument would seem to us a work of supererogation.

We have discussed the point at issue, it must be seen, in

the utmost candor, endeavoring constantly to present the authorities *fairly* to the court, and making only such comments as were warranted by decisions we have relied on to sustain our position.

Many cases cited are of ancient date; some of them are not as clear as those of modern times, but read in the full light of reason, with the qualifications and expositions of enlightened jurists of our period, not one of them sustains the argument of counsel for plaintiff in error.

We rely on the American construction of such a power as the one involved in this case, and might have contented ourselves with the case of Le Roy *vs.* Beard, decided by the Supreme Court of the United States, but we have chosen rather to follow the counsel for plaintiff, take up the authorties cited by him one after another, and answer fully each and every position he has assumed.

Bald precedents are the poorest reliance in this day of improved jurisprudence, and courts throughout England and America, rising to the dignity which their importance to society demands, have universally endorsed the golden maxim, "Authority springs from reason; not reason from authority. True reason needs not be confirmed by any authority."

Reply to Second Point made by plaintiff in error.

The counsel for plaintiff asks: "Was the deed to Whitsitt duly acknowledged?"

We assert that it was, and ask a review of the facts connected with this branch of the case.

The power was made to "Bela M. Hughes."

The deed to Whitsitt names the parties as Ben. Holladay, by "Bela M. Hughes," his duly authorized attorney-in-fact, the party of the first part, and proceeds to show that it is the party of the first part (Holladay) who "grants, bargains, sells, and conveys," stipulates for the holding of the prop-

erty by Whitsitt, and warrants the title. Here Holladay is shown to be the party granting, and in the final clause it is "the party of the first part" who sets his hand and seal to the deed.

Then the deed is signed,

"BEN. HOLLADAY. [SEAL.]
"By his attorney-in-fact, B. M. HUGHES, [SEAL.]"

Then follows an acknowledgment by the attorney which has given rise to so much ingenious criticism.

It is an established rule that if an acknowledgment contains the substance of the statutory requirement it shall not be vitiated by surplusage.

This acknowledgment does show that if it were a "physical impossibility" for Holladay to appear in person, that "Bela M. Hughes," his attorney-in-fact, did appear in person. The attorney-in-fact whose name appears in the body of the deed, whose name it is admitted by the stipulations (Nos. 5, 6, and 7) appears as attorney-in-fact for Holliday at the foot of the deed when signing his principal's name.

Certainly Hughes came in person before the notary, and then the notary goes on to say, "and acknowledged that he freely and voluntarily executed the within conveyance as the attorney of Ben. Holladay, and as the free and voluntary act and deed of the said Ben. Holladay."

Thus we trace the name of Bela M. Hughes: *first*, in the description of the parties in and to the deed; *second*, signing as "attorney-in-fact" for Holladay, at the foot of the deed; *third*, in his appearance before the notary to acknowledge the deed.

The statute of Colorado, title "Conveyances," prescribes no form for the acknowledgment of deeds; (see acts 1861, p. 64.) It simply requires that deeds should be acknowledged (sec. 2) by the grantor or his attorney.

"That section 2 reads as follows:"

"SEC. 2. All conveyances of real estate or of any interest

therein shall bear the true date thereof, the Christian and surnames of the grantors and grantees, unless one or the other or both be a body politic or corporate, and in such cases, the full style of such body, shall contain an accurate description of the premises, or the interest in the premises intended to be conveyed, and shall be subscribed by the party or parties making the same, and be duly proved or acknowledged before some officer authorized to take the proof or acknowledgment of deeds, or by his, her, or their attorney-in-fact." See an act entitled, "An act concerning the conveyances of real estate in the statutes of Colorado," sec 2, p. 64, approved November 5th, 1861.

Then if the notary's certificate shows that "Bela M. Hughes," in any form, or any manner, simply acknowledged that he had executed the deed, that is enough.

A certificate of acknowledgment, in some respects similar to the one under discussion, was passed on a short time since by the Supreme Court of California. It will be seen that it is not as clear by any means as the certificate of acknowledgment to the deed to Whitsitt.

Talbert *vs.* Stewart, *et al.*, 39 California, 603.

The certificate of the California notary is as follows: "On the 22d day of October, A. D. 1850, personally appeared before me, a notary public in and for said county, John A. Sutter, *by his attorney-in-fact*, John S. Fowler, known to me *to be the person who executed the within instrument* of writing, *who* acknowledged to me that he signed, sealed, and delivered the same as *his voluntary* act, and for the uses and purposes therein mentioned."

In a case cited in 1 Douglass Mich. Reports, 106, a principal executed the instrument by agent. The certificate of acknowledgment stated "that the principal appeared before him by his agent," and acknowledged the same.

This was held good. (See 1 Doug. Mich., and other cases.) Again Hughes acknowledged the deed as the act of his principal, and this was proper, and does not seem to have

been objected to by counsel; but we think it well, while on the subject, to show that the acknowledgment is altogether sufficient. See 2 Serg. & Rawle, 80; 1 Doug. Mich., 106; Peters C. C. Rep., 188; 5 Peters, 132; 13 Peters, 271; 11 Ala., 997; 22 Vt., 274; 5 Binney, 276; 6 Binney, 435; 7 Mass., 14; 2 Cush., 337; 1 Har. McH., 141; 2 Hill on Real Prop., 283.

The court will see that this deed to Whitsitt was subsequently acknowledged again by Hughes, the attorney-in-fact of Holladay. (See Exhibit B in Record.) The form of this second certificate has encountered no actual criticism of the counsel for plaintiff, and he admits that it "affords an example of a nearly correct certificate;" we rather think it does, and if only "nearly perfect," it will fully satisfy the court. Indeed, we go further, and assert that it is as good as one can be made. It complied with a form which is endorsed by Abbott, in New York, and Dunlap, in Pennsylvania, as will be seen in the "American Conveyancer" and the "Book of Forms."

But then the counsel says of this last certificate of acknowledgment "but of course it cannot affect the status of the suit already commenced," but makes no argument, and cites no authority to sustain his complacent assertion. Why should it not affect this case?

The counsel does not venture to say why, and for the simple reason that he could make no argument on that point to sustain his assertion.

We propose to argue the point on behalf of our client.

The statute of Colorado, entitled "An act concerning conveyances," approved November 5th, 1861, above cited, was repealed by the revised statute of Colorado, adopted "January 10th, 1868." See revised statutes of Colorado, title, "Statutes Repealed," page 683. The deed made by Bela M. Hughes, as attorney-in-fact for Ben. Holladay, was made when the said act of November 5th, 1861, entitled "An act concerning conveyances," was in force.

Instead of that repealed act of November 5th, 1861, the revised code, adopted Jan. 10th, 1868, enacted another statute, entitled "Conveyances," sections of which read as follows, viz:

"SEC. 1. Any person, association of persons, body politic or corporate, who shall be entitled to hold real estate, or any interest in real estate whatever, shall be authorized to convey the same to another, or others, or body corporate or politic, by deed.

"SEC. 13. Deeds, bonds, and agreements in writing, conveying lands, or any interest therein, or affecting title thereto, may be acknowledged or proved before the following officers: *First*, when executed within this Territory, before any justice of the supreme or district courts, before any clerk of the supreme or district courts, or the deputy of any such clerk, or before the probate judge of any county, such probate judge and such clerks severally certifying such acknowledgment under the seal of such court, respectively; before the clerk and recorder of any county, or his deputy, he certifying the same, or his deputy, under the seal of such county; before any notary public, he certifying the same under his notarial seal, or before any justice of the peace, within his county.

* * * * * *

"SEC. 14. No judge, clerk, or other officer shall hear or certify any such acknowledgment unless the person making the same shall be personally known to such officer to be the identical person who executed such deed, or shall be proved to be such by at least one competent, credible witness, and the officer hearing such acknowledgment shall state in his certificate thereof that the person making such acknowledgment was personally known to him to be the same person who executed such deed, or other instrument in writing, or was proved to be such by the oath of some credible witness, to be named in such certificate in the presence of such officer.

"SEC. 15. When any such deed or instrument of writing has heretofore been, or shall hereafter be executed, and not acknowledged according to law, at the time of the execution thereof, such deed, or instrument of writing may at any time

subsequent be acknowledged by the makers thereof, in the manner hereinbefore provided.

* * * * * * *

"SEC. 19. All such deeds, bonds, agreements, and powers of attorney, acknowledged or proved in accordance with this chapter, or acknowledged, attested, or proved in accordance with the laws of this Territory, or the local laws of the mining district wherein such real estate is situate, in force at the date of such acknowledgment, attestation, or proof may be read in evidence, without, in the first instance, additional proof of the execution thereof.

* * * * * * * *

"SEC. 22. Every certificate of the acknowledgment or proof of any deed, bond, agreement, power of attorney or other writing for the conveyance of real estate, or any interest therein, or effecting title thereto, shall be subscribed by the officer certifying the same with his proper hand, and shall be endorsed upon or attached to such deed or other writing."

That the Legislature was competent to pass this act, we would cite the case of Watson *vs.* Mercer, (8 Peters, 88,) in which the right to pass and the constitutionality of such an act is declared by the Supreme Court of the United States.

A case presented itself in Connecticut in relation to an act passed in 1826, declaring that *no levy of an execution* theretofore made *should be deemed void* by reason of defects, which in the then state of the laws were fatal. A levy was made before the confirmatory act was passed, and the court decided it *good*. Hosmer, C. J., said in Beach *vs.* Walker, the case cited:

"Every act of the Legislature intrinsically implies an opinion that the legislative body had a right to enact it, and the judiciary will discover sufficient promptitude if it determine a law to be invalid that operates by way of retrospection unjustly on person or property. This principle steers a correct medium, admitting the sovereignty of the Legislature to do justice by an act unquestioned by the court of law, while it equally repels the supposed uncontrollable omnipotence of the same body to require the observance of an un-

just law, in subversion of fundamental rights and in opposition to the social compact. The question is not free from difficulty, but unless the doctrine sanctioned by the court be embraced, *this extreme* would be resorted to, that every retrospective law, however just or wise, affecting the property of an individual, must be considered as of no validity, and thus in cases the most equitable and salutary, the judiciary must deny the legislative right to pass a law oppressive to no one and promotive of entire justice, and this upon the authority of *general principles*. I am not speculatist enough to yield my sanction to this course of proceeding."

See 6 Conn., 198.

This point was passed on in Choteau *vs.* Jones, (11 Ills., see p. 322,) and the legislative action approved.

The Supreme Court of the United States held that the act of 1826 of Pennsylvania, which declares "that deeds *already executed* by husband and wife *should not be deemed void*" for defects in the acknowledgment, "was not unconstitutional under the constitution of that State, (15 Serg. and Rawle, 72; 16 Serg. and Rawle, 35,) nor repugnant to the Constitution of the United States; that it did not impair the obligation of contracts, but rather confirmed them, and that the United States courts could not declare it void, as interfering with vested rights."

See 2 Peters, 380; 8 Peters, Watson *vs.* Mercer, 108.

In the case of Culbertson *vs.* Parker, (15 Ind., 234,) it was held "that a deed of conveyance, executed without a seal, though defective at the time of its execution, is made valid by subsequent acts of the legislature."

It was held in Wisconsin, (4 Wis., 143,) Young *vs.* Wright, that an attorney in fact could make an acknowledgment to a deed, even after his power was revoked. The stipulations in the record sent up of this case, admit the payment of the purchase money by Whitsitt to Holladay's attorney-in-fact, Hughes, for the lots in dispute, and Hughes had not only the right to re-acknowledge the deed made, but to make a

new one to correct any defect whatever. It was his duty to do so, to perfect the sale already made, in justice to the purchaser. (6 Serg. and Rawle, 146.)

So much for this re-acknowledgment of the deed by Hughes, on the 13th day of December, A. D. 1870, which is part of the record admitted.

Again the statute of Colorado of 1868, entitled "Conveyances," page 112, provides as follows:

"That deeds, &c., for the conveyance or encumbering real estate or any interest therein, shall be deemed from the time of being filed for record notice to subsequent purchasers or encumbrancers, though not acknowledged or proven according to law; but neither the same, *nor* the record thereof, shall be read as evidence, unless *subsequently* acknowledged or proven according to law, or unless their execution be otherwise approved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof; this section shall apply as well to all such deeds, bonds, and other writings *heretofore recorded*, as to those hereinafter to be recorded."

The power to pass this statute has been argued above in discussing the re-acknowledgment by Hughes, the attorney-in-fact of Holladay, and in sustaining section 15 of the act of 1868. And here we might rest our case so far as this mooted point is concerned.

But proposing to exhibit fully the weakness of the position of the counsel for plaintiff in error we will examine the Colorado statute of 1861 aforesaid.

We hold, what cannot be successfully disputed, that the statute is an affirmative one, and did not take away, was not intended to take away, the common law right of a party to make a deed good under *that* law.

We maintain that if the formalities prescribed in the section 2 were not complied with (as we have shown they were) that the power and the deed under it were good as between

the parties under the common law, if the statute had been disregarded. Lord Mansfield, in Hall *vs.* Campbell, Cowper, 204, 211, 212, says, "the subject carries in his settlement the common law with him." Thus to America. The doctrine here is, "that it is an inheritance brought by our ancestors, and all our jurisprudence stands upon it."

Story on the Constitution, 157, etc.; 1 Kent. Com. 534, 536.

1 Mass., 60; 2 Mass., 534.

A deed at common law good against a grantor is required to be "signed, sealed, and delivered."

See Dole *vs.* Thurlow, 12 Metcalf, 165.

A deed is a writing "signed, sealed, and delivered."

Co. Litt., 35 b, 3 Dane's abr., 354.

4 Kent, 456.

1 Serg. & Rawle, 72, and witnesses not essential.

Cruise Dig., Tit. 32, C. 2, sec. 60.

Garret *vs.* Listor, 1 Lev., 25.

Petersdorf's Abridg., 664, 665.

When no witness to it, it may be proved.

Phil. Ev., part 2, c. 8, sec. 1.

1 Starkie Ev., 335.

This statute of 1861, aforesaid, was simply an affirmative statute. It requires negative words to make a statute imperative.

Rex *vs.* Leicester, 9 Dow. and Ry., 972; 7 Barn. and Cres., 12.

A statute directing a person to do a thing in a given time without any negative words restraining him from doing it afterwards, is directory and no limitation of authority.

See 3 Mass., 16.

16 Barb., 61.

[illegible]., 302.

The Supreme Court of the United States held in United States *vs.* Linn, 15 Peters, 290, that the bond given by him was binding, though seals were omitted, though the act of May 10, 1800, required that such officer (receiver of public moneys) should give bond, and said, "there are no negative words in the act, nor anything by implication or otherwise, to make void a security taken in other form, nor *is there anything in reason* or sound principle that should lead to such a conclusion." The act referred to says: "Before entering on his duties, the receiver *shall* give bond," &c.

See Brightly Dig., vol. 1, p. 497, sec. 221.

The act of February 19, 1819, of the statutes of Illinois, required that deeds to real estate "should be acknowledged and should be recorded" in a manner therein prescribed, and said, "and every such deed or conveyance that shall at any time after publication hereof be made and executed, and shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration." The supreme court of that State, held, in Doe *vs.* Miles, 2 Scam., 315, 317, that "the deed was valid as between the parties to it without being acknowledged and recorded," and this rule was recognized in McConnell *vs.* Reed, 2 Scam., 374, "that the acknowledgment of a deed is a cumulative mode of proving its execution only."

This rule was adopted in Indiana, 2 Blackford, 32; Doe *vs.* Naylor, 5 Blackford, 92; Stevenson *vs.* Cloud, and in California, also, 1 Cal. Dig., p. 256, in two cases, 19 Cal., 551, 26 Cal, 393.

The purpose of the statute of Colorado of 1861, (when we consult sec. 9 and sec. 11,) was to protect subsequent purchasers and encumbrancers. It declares that conveyances (sec. 9) not recorded shall be invalid as to such persons; selects them for protection, and not specifying that such unrecorded deeds shall be invalid as to the grantor, if not recorded, it

is clear did not intend to avoid deeds as to a grantor. It thus explains the object of the act. Those sections in the statute of Colorado, of November 5th, 1861, (see p. 64 of that statute,) are as follows:

"SEC. 9. No conveyance of real estate, or of any interest therein, shall be valid against a subsequent purchaser for a valuable consideration, and without notice of its existence, nor against a subsequent incumbrancer by mortgage or judgment, until it shall be recorded in the office of the recorder of the county in which the premises conveyed are located.

"SEC. 11. Conveyances of real estate, or of any interest therein, proved or acknowledged before any United States judge, or justice, or commissioner of this Territory, or notary public, and duly certified by such officer, may be recorded in any county recorder's office in this Territory without any other verification."

Bouvier says: "An affirmative statute is one which is enacted in affirmative terms; such a statute does not take away the common law. If, for example, a statute without negative words declares that when certain requisites shall have been complied with, deeds shall have in evidence a certain effect; this does not prevent their being used in evidence (though the requisites have not been complied with) in the same manner as they might have been before the statute was passed." (2 Bouvier L. D., 546.) This rule is adopted in 2 Caines' Rep., 169.

"A negative statute is one expressed in negative terms, and so controls the common law, that it has no force in opposition to the statute." (Ib.)

The statute of Colorado "concerning conveyances of real estate," approved November 5th, 1861, above recited, employed no negative words. (See page 64 of that statute, and section 2, which has been already copied in full in this argument hereinbefore.)

It prescribes a method of conveying land, and "no nega-

tive words are employed in it to show that it was the intent of the act to forbid any other mode" of conveyance.

The power of attorney is a common-law deed, (1 Sugden on Powers, p. 1,) good between the parties to it. The deed to Whitsitt is good as a common-law deed between grantor and grantee, as we have shown above, and stripped of all certificates of acknowledgments, the signature and execution admitted to both instruments, they are unassailable by the plaintiff in error.

Sedgwick, in his work on Statutory and Constitutional Law, p. 38, says:

"Affirmative statutes are statutes passed in the affirmative, and it has been held, with that reverence for the ancient common law which characterizes the early decisions of the English courts, that a statute containing a mere affirmative provision, without any negative expressed or implied, does not alter any common law rule existing in regard to its subject-matter."

In New York, (2 Caines, 169,) it was held "if a statute without negative words declares that when certain requisites have been complied with, deeds shall have in evidence a certain effect, this does not prevent their being used in evidence, though the requisites have not been complied with, and in the same manner as they might have been before the statute was passed."

A statute of 1804 of the United States, March 27, says "all records *shall* be proved," in a manner therein set forth, viz: records of one State offered in another. The circuit court of the United States, Nelson, judge, in a case where a record of one State was offered in another State, says:

"True, it is not authenticated in accordance with the act of Congress of 1804, but I do not understand that this act excludes every other mode of authentication, or abrogates any principle of evidence previously established."

See Legal News, 4 vol., p. 75; Logansport Gaslight and Coke Co. *vs.* Knowles *et al.*

And here a statute is passed which uses the potent word "shall," and it is held to be simply cumulative and affirmative, and this by a court of paramount authority in Colorado Territory.

In the case of People *vs.* Crayscroft it was held in conformity with the current of authorities, that "where a right exists at common law and a new remedy is given by statute, it is simply cumulative."

2 Cala, 243.

We have abundantly shown that the power and the deed under discussion were good at common law, if *signed, sealed and delivered.* None of these requisites are disputed in this case, or arise for debate, as the signing, sealing and delivering are admitted in the record. They are valid between the parties as good instruments at common law.

The statute of Colorado of November 5th, 1861, "concerning conveyances of real estate," section 2, page 64, already copied hereinbefore, "did not create a new right." Citizens had the right to sell and convey lands before its passage, a right that the legislature could not destroy, while it might provide for the acknowledgment or proof and registry of the deeds of conveyance.

In the case of Myrick *vs.* Milan (13 Wisconsin Reports, 188,) it was held that a deed was good between the parties though not acknowledged or recorded as the statutes of 1839, then in existence, prescribed in direct terms. And the decision was endorsed by the same court in March, 1870; 3 Legal News, 181.

The statute of Wisconsin discussed in the case cited (Myrick *vs.* Milan) read thus: "No conveyance is valid to pass title to land as between grantor and grantee *unless* signed, sealed, and delivered by the party granting the same," and acknowledged and recorded, &c.

In the case of Milligan *vs.* Dickson, Pet. C. C. Reports, 433, it was held that a deed for land made under a power of

attorney, *acknowledged* before a mayor or other chief magistrate of a city, *instead of being proved* before him by the witnesses, and certified by him under the public seal is evidence under the common law of Pennsylvania, notwithstanding the act of 1705, which *speaks only of powers proved* by witnesses. Judge Washington held that the statute provided merely for the case of powers of attorney proved by attesting witnesses, *but it* does not exclude all other modes of proof.

Reply to the Third Point made by the Counsel for Plaintiff.

We pass now to the last position assumed by the counsel for plaintiff in error.

The point made is, that when Hughes signed the grantor's name at the foot of the deed, he did not write "By his attorney-in-fact, *Bela* M. Hughes," instead of writing "By his attorney-in-fact, B. M. Hughes."

The argument made by us to the second point of the counsel for plaintiff fully answers this objection, yet we propose to discuss the same from another standpoint.

See statute of Colorado, entitled "An act concerning conveyances of real estate," approved November 5th, 1861, page 64, and section 2 of the act.

The statute required that conveyances should have the Christian and surnames of "grantor and grantee." The term "Christian name" means that name which one receives in baptism, as distinguished from the "surname." (The statute really meant any name used before the surname, and we imagine did not intend that all deeds should be invalid where the grantors and grantees might be so unfortunate as never to have been baptised at all!)

No question was raised in the district court as to the "orthodoxy" of the names of the grantor and grantee in the deed, and none was raised as to the mode in which Hughes signed as "attorney-in-fact" for the grantor.

No question could have been raised there, and none can be raised here, for the stipulations on file admit that "Bela M. Hughes" and "B. M. Hughes" were one and the same person.

The admissions in the agreed case in the court below bearing on this point are—

"That Bela M. Hughes," as attorney-in-fact "for and in name of Ben. Holladay, *executed* and delivered a deed to Whitsitt for the property in controversy," a copy of which, marked "B," is previously admitted by the parties to the suit.

"That Hughes, in making said conveyance, acted under and by virtue of a power of attorney given him by Ben. Holladay and N. A. Holladay, *his wife.*

"That the *signature to the power* and to the *deed to Whitsitt* are genuine, and the signing of the same respectively is admitted."

These admitted facts dispose of this last fine drawn point of the counsel for the plaintiff completely, for he has admitted that he who signed as "B. M. Hughes" was really "Bela M. Hughes," and also rendered all discussion about the form of acknowledgment to the deed wholly unnecessary.

If this fact had not been admitted, and the counsel had chosen to raise this objection below, we could have proved the fact, and it would have been entirely competent to do so, as has frequently been decided in the courts of this country.

We, however, cite only one case, an action of ejectment in Illinois, reported in 36 Illinois Reports, Lyon *vs.* Cain, 367.

In the same case it appeared that the grantors named in the deed involved were stated to be "Samuel B. Postly" and "Abraham B. Kain," and that the deed was signed "S. Brook Postley" and "A. Boudoin Kain."

The judge adverting to this fact says: "It it conceded that the names are correctly written in the body of the deed, and the officer taking the acknowledgment certifies that he

knows them to be the identical persons named in the foregoing deed of conveyance, as the makers thereof;" and he says, also, "when it is remembered that the law requires the officer to be personally acquainted with the grantor, or to have his identity proved before he receives the acknowledgment, we can perceive no irregularity in the execution of the conveyance. The identity of the *grantor* and not the person who merely signs the deed must be established before the officer can act. His identity is a fact the officer must know, or have proved, before he is authorized to grant his certificate, and when he has found and certified that fact it is binding until rebutted. There is no evidence (says he) in the record attacking the truth of the certificates, and they must in this particular be held sufficient. The party executing any instrument may adopt any name and he will be bound by its execution. If not his real name, his identity with the execution must be proved, and we think it has been done in this case." See, also, 26 Ills., 54, where a clerk of a court gives an initial for his first name.

In the case, pending in this court, will be found features which render the decision cited exactly in point and entirely applicable.

The statute of 1861, we would remark, only requires that the "*Christian and surnames of the grantor and grantees*" should be given. (Statute of Colorado, entitled "An act concerning conveyances of real estate," approved November 5th, 1861, section 2.)

Holladay is the grantor in the deed, and Whitsitt the grantee, and their names are given. The full name of the attorney-in-fact is given in the body of the deed, though he signs as "B. M. Hughes" at the foot of it. The statute does not require that the deed shall bear the Christian name of an attorney acting for another person, and it is not a little surprising to see the counsel for the plaintiff in error, making such an argument, in the face of the fact that he has all along been contending for a literal following of the statute.

The better authority on this point, and the most rational, is to the effect that "when the deed itself stated that it was executed by the grantor by his attorney, W. M.," and was simply signed M. H., (the principal's name,) it may be held a good execution. (See 2 Watts and Sergt. Rep., 328.)

Now, if the name of Holladay alone appeared at the foot of the deed to Whitsitt, without being accompanied by the signature of his attorney-in-fact at all, the deed would be good.

Hard pressed for authority, the counsel for plaintiff in error has cited 4 and 7 Indiana Reports, which merely assert the doctrine that demands certainty of description in the name of a person indicted. We shall not follow counsel for plaintiff into the domain of criminal law.

"A supplemental brief and argument" was filed in this case by plaintiff in error, by consent.

This argument seems to have been suggested to counsel by the decision lately given in the supreme court of Illinois, in the case of Kingsbury *et al. vs.* Burnside *et al.*, reported in Chicago Legal News of date November 11, 1871.

This argument is a fair specimen of the legal ingenuity which marked the previous effort of the counsel in this case, is remarkably "*far-fetched*" and inappropriate, without the slightest real application to or bearing upon the case pending in this court.

We have, we think, answered and overthrown each and every objection raised by counsel to the execution of the power in question—to the validity of the deed made under it; indeed, every issue tendered by him in behalf of the plaintiff in error.

We have advanced good and substantial reasons in support of every position taken by us, and sustained them successively by authority, the highest in our land.

We have taken every possible view that can be taken of this case; we have gone out of our way and argued every possible phase that could be presented, and have shown that

the judgment of the supreme court of Colorado should be affirmed.

The law is not a system marked by folly and fatuity, based on bald sentences without reason—it is a grand code, founded on the necessities of men, erected by mature judgment, gradually expanding in beneficence and wisdom as time progresses, and regulating with care the interests of society and civilization.

J. W. DENVER,
For Defendant in Error.

I add the two cases of
Dodge v Hopkins 14 Wis 685
Dolan. Cain 14 Wall 478
R Phillips